Supreme Court

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No. _____ OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

STROH DIE CASTING CO.,
Petitioner,

v.

ATLANTIC STATES LEGAL FOUNDATION, INC.,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTION PRESENTED

Does the federal court have jurisdiction over a citizen suit under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et. seq., where the only post-complaint violations are at an outfall which the citizen-plaintiff never included in a 60-day notice of intent to sue?

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For The Seventh Circuit

Stroh Die Casting Co. ("Stroh") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 17, 1997 in which the Court reversed the decision of the United States District Court Eastern District of Wisconsin and remanded the case to the district court.

OPINIONS BELOW

The opinion of the district court is not officially reported. It is reproduced as Appendix A, infra. The opinion of the Court

of Appeals is reported as Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co., 116 F.3d 814 (7th Cir. 1997). It is reproduced as Appendix B, infra.

JURISDICTION

The Court of Appeals entered its judgment on June 17, 1997. (Appendix B, infra). The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The pertinent provisions of 33 U.S.C. § 1365 and 40 C.F.R. §135.3 are set forth in Appendix C.

STATEMENT OF THE CASE

This is a citizen suit under the Federal Water Pollution Control Act ("Clean Water Act"). The plaintiff, Atlantic States Legal Foundation, Inc. ("Atlantic States") seeks civil penalties, injunctive relief, and attorneys fees from Stroh Die Casting Co., Inc. ("Stroh") for alleged post-complaint violations of permit limitations and federal regulations. The allegations relate to discharges at an outfall location which Atlantic States never included in any of its pre-complaint notices to Stroh.

The plaintiff invoked the jurisdiction of the United States District Court for the Eastern District of Wisconsin under 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a). Under the Clean Water Act and Gwaltney v. Chesapeake Bay Foundation, 484 U.S. 49, 62, 108 S.Ct. 376, 384, 98 L.Ed.2d 306 (1987), the citizen-plaintiff must allege that the defendant is an "ongoing violator" of the Clean Water Act in order to invoke the subject matter jurisdiction of the district court. Stroh maintains that because it is not an "ongoing violator" of the Clean Water Act with respect to the noticed outfalls, the district court lacks subject matter jurisdiction to entertain this citizen suit.

In November, 1988, Atlantic States provided Stroh with a 60-day notice of intent to sue pursuant to 33 U.S.C. § 1365(b). In this first notice, Atlantic States identified alleged violations at two of Stroh's storm sewer outfalls (pipes): WDNR 001 and WDNR 003. An outfall is a specific pipe location where wastewater is discharged and test samples can be taken. On January 23, 1989, Atlantic States filed suit for the alleged exceedences of discharge standards at these two DNR storm sewer outfalls.

The district court eventually dismissed the suit without prejudice when Atlantic States failed to respond to Stroh's motion to dismiss. Stroh had argued in its motion that it was not a "continuing violator" of the Clean Water Act, and that the district court therefore lacked subject matter jurisdiction over the case.

In April, 1989 Atlantic States sent a second 60-day notice of intent to sue to Stroh. This notice alleged that Stroh was discharging process wastewater to the Milwaukee Metropolitan Sewage District ("MMSD") without a permit and that Stroh had exceeded federal "categorical standards" in November, 1988, at one outfall, MMSD 3.

In July, 1989, the MMSD issued Stroh an Industrial Wastewater Discharge Permit which set specific parameters and required testing and monitoring at the three outfalls from which Stroh discharged process wastewater: MMSD 1, 3, and 4. In addition, from late 1989 to early 1990, Stroh was designing and implementing a new wastewater treatment system at its plant. In June, 1990, Stroh completed this new treatment system which combined the process wastewater previously discharged at MMSD outfalls 1, 3 and 4 into a single stream which is now discharged at MMSD outfall 4. Stroh no longer discharged industrial process wastewater to MMSD outfall 3 and it was abandoned. In October, 1990, the MMSD issued Stroh a revised permit which reflected these changes.

MMSD outfall 4 was the very same pipe from the time the first permit was issued in 1989 as it is now. Since July, 1989, MMSD outfall 4 was subject to its own set of effluent standards, monitoring requirements, and reporting requirements. Its reports were available to Atlantic States starting in 1989. However,

Atlantic States never provided Stroh with notice of intent to sue for any MMSD outfall 4 violations.

Atlantic States' last notice described alleged violations only in 1988, before the initial permit was issued or the parameters were set. Atlantic States has never provided Stroh with any notice that Stroh exceeded the limitations set forth in the permits issued to Stroh. Now Atlantic States has convinced the Seventh Circuit that its pre-permit notice was sufficient to cover post-permit violations of the 1989 permit. That is impossible.

In May, 1990, Atlantic States filed an amended complaint which repeated the claims of the original suit relating to WDNR outfalls 001 and 003 and also added claims relating to Stroh's discharges to the MMSD. This suit alleged that Stroh was an "ongoing violator" of the Clean Water Act. However, the last reported exceedence at MMSD outfall 3, the only MMSD outfall ever noticed by Atlantic States, occurred in October, 1989, eight months before the amended complaint. By June, 1990, as part of the installation of the new treatment system, all process wastewater was discharged, monitored, and reported at MMSD outfall 4. Therefore, all post-complaint MMSD exceedences raised by Atlantic States in its summary judgment motion papers occurred at MMSD outfall 4, which was never identified in any notice from Atlantic States.

Stroh has never been fined or sanctioned by the federal, state, or local enforcement agencies having jurisdiction over Stroh's discharges.

On July 28, 1992, because Stroh could not be an "ongoing violator" with respect to any of the noticed outfalls, Stroh moved for summary judgment and the dismissal of Atlantic States' complaint. In its March 22, 1996 decision, the district court found that Atlantic States could only possibly allege post-complaint violations at MMSD outfall 4 and that Atlantic States had never provided the requisite 60-day notice for any violations at that outfall. (Appendix A, A-14) The district court determined that the alleged MMSD outfall 4 violations were beyond the scope of the lawsuit, held that Stroh was not an "ongoing violator" at any of the noticed outfalls, and dismissed Atlantic States' complaint. (Appendix A, A-14)

In a split decision, the United States Court of Appeals for the Seventh Circuit reversed the decision of the district court and remanded the case. (Appendix B, B-14) The Seventh Circuit recognized that neither of Atlantic States' notices to Stroh mentioned violations at MMSD outfall 4. (Appendix B, B-8) However, the court found that because the April, 1989 notice "sufficiently informed" Stroh and gave it an opportunity to correct the problem, this notice satisfied the jurisdictional requirement of the Clean Water Act. (Appendix B, B-10).

In his dissenting opinion, Circuit Judge Manion agreed with the district court that Atlantic States' complaint should be dismissed. (Appendix B, B-15) Because the notice did not identify the only outfall at which Atlantic States claimed post-complaint MMSD violations, the district court lacked jurisdiction to entertain those claims. (Appendix B, B-17)

The dissent also pointed out that Atlantic States had access to all of the information it needed to provide Stroh, the EPA and the Wisconsin Department of Natural Resources with notice regarding alleged exceedences at MMSD outfall 4, but failed to do so. (Appendix B, B-18) Judge Manion criticized the court's "expansive reading" of the notice requirement and stated that any MMSD outfall 4 violations should be excluded from the suit. (Appendix B, B-20)

The question presented is whether the federal court has jurisdiction over a citizen suit under the Clean Water Act, where the citizen plaintiff seeks penalties for post-complaint exceedences at an outfall it never included in any notice of intent to sue.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's loose reading of the Clean Water Act notice requirement conflicts with the Court's strict interpretation of the statute in Hallstrom v. Tillamook County.

The Seventh Circuit's expansive interpretation of the notice provision significantly conflicts with the Court's direction to strictly construe this jurisdictional requirement. Hallstrom v. Tillamook County, 493 U.S. 20, 26, 110 S.Ct. 304, 308-9, 107 L.Ed.2d 237 (1989), reh'g denied, 493 U.S. 1037, 110 S.Ct. 761 (1990). The Seventh Circuit's decision also conflicts with the application of Hallstrom by the Sixth Circuit in Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 478 (6th Cir. 1995), the Ninth Circuit in Washington Trout v. McCain Foods, Inc., 45 F.3d 1351, 1354 (9th Cir. 1995), and the Third Circuit in Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 50 F.3d 1239, 1248-49 (3rd Cir. 1995). This case gives the Court the opportunity to resolve these conflicts and provide needed guidance to the lower courts on the appropriate interpretation of the notice requirement.

The Clean Water Act provides that citizens may act as "private attorneys general" to enforce the provisions of the Act: "any citizen may commence a civil action on his own behalf. . .

against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this Act." 33 U.S.C. § 1365(a)(1).

Before the citizen plaintiff proceeds with a suit, however, it must provide notice of the alleged violation to three parties: the alleged violator, the United States Environmental Protection Agency ("EPA"), and the State in which the alleged violations have occurred:

> No action may be commenced -- (1) under subsection (a)(1) of this section -- (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . .

33 U.S.C. § 1365(b). The specific contents of the notice are prescribed by 40 C.F.R. § 135.3(a):

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereof, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

The Court has held that if the citizen plaintiff fails to strictly adhere to the notice requirements, the citizen suit must be

dismissed. Proper notice, therefore, is a mandatory prerequisite to suit.

In Hallstrom v. Tillamook County, 493 U.S. 20, 26, 110 S.Ct. 304, 308-9, 107 L.Ed.2d 237 (1989), reh'g denied, 493 U.S. 1037, 110 S.Ct. 761 (1990), the citizen plaintiff failed to strictly comply with the 60-day notice provision of the Resource Conservation and Recovery Act ("RCRA") and the Court affirmed the dismissal of the action. In Hallstrom, the citizen plaintiff provided its notice to the defendant, but not to the EPA or State authorities. The defect proved fatal to the citizen plaintiff's suit:

> The language of this provision could not be clearer. A citizen may not commence an action under RCRA until 60 days after the citizen has notified the EPA, the State in which the alleged violation occurred, and the alleged violator. . . . Under a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit.
>
> . . .
>
> [T]he notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion.

Id. at 26, 31. The Court explicitly rejected the citizen plaintiff's argument that the statute should be given a "flexible or pragmatic construction." Id. at 26.

Both the Sixth Circuit and the Ninth Circuit have recognized that under Hallstrom, the citizen plaintiff must not only

deliver the notice to the correct parties, but the notice must include the information specified by the statute. In Atlantic States Legal Foundation v. United Musical Instruments, 61 F.3d 473 (6th Cir. 1995), the Sixth Circuit examined the notice requirements of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"). EPCRA's notice requirement is substantially the same as that in the RCRA and the Clean Water Act.

In United Musical Instruments, Atlantic States provided notice of its intent to sue for reporting violations for calendar years 1987-1990 and for "violations not yet known to ASLF of other EPCRA reporting requirements." Id., at 478. In its suit, Atlantic States included an alleged violation for calendar year 1991.

The Sixth Circuit, relying upon Hallstrom, held that Atlantic States' "catch-all" notice was insufficient to confer jurisdiction on the district court for the 1991 violation:

> As the structure of EPCRA's notice provision is substantively identical to the analogous provision of RCRA, it follows that sufficient notice is also a mandatory prerequisite to filing an enforcement action under EPCRA. ASLF does not dispute this obvious implication of Hallstrom, but contends the notice of its intention to hold UMI liable for "violations not yet known" was sufficient to create jurisdiction over the alleged 1991 violation. We disagree.

United Musical Instruments, 61 F.3d at 478. Because the 1991 violation was not noticed, Atlantic States could not include it in the suit.

In Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995), the Ninth Circuit affirmed the district court's ruling that the citizen plaintiff's notice was defective because it failed to identify the two organizations that eventually became the only plaintiffs in the case. The court read Hallstrom to require strict compliance with the Clean Water Act notice requirement:

> The issue in Hallstrom was whether the notice was sufficient under the regulation's mandate -- whether the notice requirement should be strictly construed or liberally applied by the district courts. The Court held that the notice requirement under the regulations was to be strictly construed.

Washington Trout, 45 F.3d at 1354.

The Third Circuit has read the notice requirement more broadly than the Sixth and Ninth Circuits. In Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 50 F.3d 1239, 1249 (3rd Cir. 1995), the court allowed a citizen plaintiff to pursue violations not specifically noticed as long as they were "interconnected" with noticed violations.

The Third Circuit held that if a citizen-plaintiff has provided notice for a Clean Water Act "discharge" violation, it may also sue for subsequent monitoring, reporting, or recordkeeping violations of the same "type", even if these violations have not been separately noticed:

> [W]e hold that a notice letter which includes a list of discharge violations, by parameter, provides sufficient information for the recipients of the notice to identify violations of the same type (same

> parameter, same outfall) occurring during and after the period covered by the notice letter.

Hercules, 50 F.3d at 1250.

These cases demonstrate the significant conflict among the circuit courts regarding the interpretation of the notice requirement. The Third Circuit and, in this case, the Seventh Circuit, have departed from the strict construction mandated by the Court in Hallstrom and further developed by the Sixth Circuit in United Musical Instruments and the Ninth Circuit in Washington Trout.

The Seventh Circuit has approved the blanket, "catch-all" notice explicitly rejected as insufficient in United Musical Instruments. In addition, the Seventh Circuit has moved far beyond the restrictions of Hercules, which still required the notice to identify the "same parameter, same outfall" to confer jurisdiction. The Court should grant Stroh's petition to resolve this conflict among the circuits.

II. The Seventh Circuit's failure to recognize the important policy underlying strict compliance with the notice provision will flood the federal courts with Clean Water Act citizen suits.

The Seventh Circuit's decision ignores the important policy considerations behind the notice requirement. In Hallstrom, the Court recognized the two basic goals of the notice:

> First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. . . . Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the act and thus likewise render unnecessary a citizen suit."

Hallstrom, 493 U.S. at 29, citing Gwaltney v. Chesapeake Bay Found., 484 U.S. at 49, 60. Therefore, a proper notice must inform not only the operator, but also the government entities of the alleged violations.

The result reached by the Seventh Circuit in this case is inconsistent with the function of the citizen suit contemplated by the statute: "the citizen suit is meant to supplement, rather than to supplant government action." Gwaltney v. Chesapeake Bay Found., 484 U.S. at 60. By allowing Atlantic States to proceed without properly noticing Stroh, the EPA and the State of Wisconsin, the Seventh Circuit has upset the statute's deference to government enforcement before allowing citizen suits.

By finding that the "key to notice is to give the accused company the opportunity to correct the problem," the Seventh Circuit has entirely ignored the first important purpose of notice articulated by the Court in Hallstrom. (Appendix B, B-10) The "key" is for the citizen plaintiff to notify not only the alleged violator, but also the EPA and the State.

A notice, like Atlantic States', which fails to identify the "location of the alleged violation" to the operator, the EPA and the

State frustrates the operation of the statute. 40 C.F.R. § 135.3 This "catch-all" notice provides no real opportunity for potential enforcement or compromise before suit.

Here, the Seventh Circuit has allowed Atlantic States to sue for future violations not noticed. This result is 180 degrees opposite from the policy considerations recognized in United Musical Instruments and Hallstrom. Before Atlantic States filed its amended complaint in May, 1990, it easily could have noticed the violations it now claims -- and Stroh, the EPA, and the DNR could have addressed them before suit.

It is most significant that none of the government enforcement agencies ever imposed sanctions against Stroh for the noticed "violations." Instead, they worked with Stroh to eliminate the potential problems through the permitting process. This resulted in Stroh's new treatment system which eliminated the earlier problems. As Judge Manion recognized in his dissent, the only possible objective of this suit is to try to collect attorneys fees for Atlantic States' lawyers. (Appendix B, B-24)

In addition to frustrating the purpose of the notice provision, the Seventh Circuit's approval of Atlantic States' "catch all" notice will result in a huge increase of citizen suits. As the dissent recognized, the Seventh Circuit's "expansive reading" of the statute may result in "catch-all notices sent to companies which, if construed as broadly as the court has done here, would encompass any violation, past or future." (Appendix B, B-20)

In this case and in others, the lower federal courts have expressed divergent views on whether to be lax or strict in applying the 60-day notice provision in the Clean Water Act. This Court should provide some much needed guidance.

CONCLUSION

The petitioner, Stroh Die Casting Co., respectfully requests that the Court grant the writ of certiorari.

Dated at Milwaukee, Wisconsin this 12th day of September, 1997.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ATLANTIC STATES LEGAL FOUNDATION, INC.,

Plaintiff ,

-vs- **Case No. 89-C-100**

STROH DIE CASTING CO., INC.,

Defendant.

DECISION AND ORDER

This is a citizen suit brought by the plaintiff, Atlantic States Legal Foundation, Inc. ("Atlantic"), under the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. 1365. Atlantic seeks relief for defendant Stroh Die Casting Co., Inc.'s ("Stroh") alleged repeated discharges of pollutants into a tributary of the Menomonee River and into Lake Michigan via the Milwaukee Metropolitan Sewerage District ("MMSD"), in violation of the National Pollutant Discharge Elimination System ("NPDES") permits issued by the Wisconsin Department of Natural Resources ("DNR") pursuant to the Act. An initial action brought by Atlantic was dismissed without prejudice by Judge Robert W. Warren on the Court's own motion on November 14, 1989. On May 7, 1990, Atlantic filed an amended complaint. Leave to file this amended complaint was granted by Judge Warren on April 16, 1992. Stroh answered, and cross-motions for summary judgment were filed.

BACKGROUND

The Clean Water Act, 33 U.S.C. 1251 et seq., establishes a system for regulating both direct discharges (to surface waters) and indirect discharges (to municipal sewer systems) of pollutants into United States waters. Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), the citizen suit provision, provides, subject to certain procedural requirements, that:

> [A]ny citizen may commence a civil action on his own behalf--
>
> > (1) against any person. . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, ...

Atlantic sues under this provision.

To establish federal court jurisdiction, citizen plaintiffs, such as Atlantic, must "allege a state of either continuous or intermittent violation -- that is, a reasonable likelihood that a past polluter will continue to pollute in the future." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 57 (1987).

The Fourth Circuit analyzed this Supreme Court decision as follows:

> The Supreme Court held that citizen-plaintiff suits under § 505 could not be based on wholly past violations, but carefully distinguished an allegation of a wholly past violation from allegations of intermittent or sporadic violations. The Court

noted legislative history in support of the proposition that

> an intermittent polluter -- one who violates permit limitations one month of every three -is just as much "in violation" of the Act, as a continuous violator.

108 S.Ct. at 384.

> The Supreme Court remanded in light of its holding that "§ 505 confers jurisdiction over citizen suits when citizen plaintiffs make a good faith allegation of continuous or intermittent violation. . . .' 108 S. Ct. at 385.

Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 171 (4th Cir. 1988). Not only must allegations of "continuous or intermittent" violations be made in order to establish the Court"s jurisdiction, but a 60-day notice of those violations must be given to the alleged violator (among others) before any action can be commenced.

Section 505 of the Clean Water Act, 33 U.S.C. 1365(b), provides:

> No action may be commenced --
>
> > (1) under subsection (a)(1) of this section --
> >
> > (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order .
> >
> > . . .

Stroh contends that the aforementioned 60-day notice must be given as to each offending source of discharge when there is more than one offending source of discharge within a company. A general notice that is given or directed to a company that houses the various sources of discharge is inadequate. Specific notice must be given to a company as to each offending source of discharge, what Stroh labels as "point sources" or "outfalls." Therefore, the notice to the alleged violator must be on a "point source-by-point source" basis, that is, the required notice must be 'point source' specific before the Court has jurisdiction to hear the alleged violation.

Stroh had three discharge pipes or "point sources" (point sources/outfalls Nos. 1, 3 and 4) at its plant. According to Stroh, while Atlantic provided Stroh with proper notice of violations as to point sources/outfalls Nos. 1 and 3, Atlantic failed to provide proper notice as to point source/outfall No. 4. As to point sources Nos. 1 and 3, Stroh submits that it had no violations or exceedences at those noticed point sources after the time Atlantic filed its amended complaint on May 7, 1990. These "noticed" violations thus became, under Gwaltney, "past" violations and not actionable.

Atlantic argues that, for notification purposes, a "facility or company can itself be considered a "point source." Atlantic contends that each point source within a facility does not have to be addressed by way of notice, pleadings and proof to determine whether a particular point violation occurred and, therefore, Stroh's argument as to point source No. 4 must fail.

The Court accepts Stroh's "point source-by-point source" analysis and finds that Atlantic failed to provide the requisite 60-day notice relative to point source/outfall No. 4. Stroh's motion for summary judgment related to point source No. 4 must be granted. The Court further finds that no reasonable jury could conclude from the undisputed facts that Stroh was an intermittent and/or continuous violator relative to Stroh's "point sources"

known as pipe outfalls Nos. 1 and 3. Therefore, Stroh's motion for summary judgment is granted in all respects and the case is dismissed.

ANALYSIS

A. 'Point Sources' Nos. 1 and 3.

The discharges occurring at point sources/outfalls Nos. 1, 3, and as we see later, 4, are undisputed. Indeed, they are based upon reports and records that Stroh was required to submit.

The reports establish two post-amended complaint "events" at point source/outfall No. 3 which were offered by Atlantic as "proof" of ongoing or intermittent permit exceedences. Because the first event concerns PCBs and because Stroh's permit contains no daily effluent limitation as to PCBs, (Gene Sewalish Affidavit, September 17, 1992, at Para. 2), Atlantic is unable to prove an exceedence of Stroh's daily effluent limitations relative to that permit.

The second exceedence at point source/outfall No. 3 is based on a faulty lab test. A laboratory letter verifying that this result was due to "error" on the lab's part is attached to the supplemental Sewalish affidavit dated September 17, 1992. Because the PCB annual monitoring result and the result of a faulty lab test do not meet Atlantic's burden to show that, Stroh was an ongoing or intermittent violator at point sources Nos. 1 and 3 after May 7, 1990, all of the exceedences noticed and alleged by Atlantic at these "point sources" are "wholly past" within the meaning of Gwaltney. Any claim based on these alleged violations must be dismissed.

B. "Point Source" No. 4.

Both parties argue that the language of the Clean Water Act, the regulatory structure of the Act, and United States Supreme Court and other cases defining a "point source" support their proffered definition of a "point source." Review of these authorities compels the Court to side with Stroh.

Section 1365(a)(1) authorizes a citizen suit "against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter . . . ." (Emphasis added.) This Court accepts as the definition of "violation" in this section that which is set out by the court in South Carolina Wildlife Federation v. Alexander, 457 F.Supp 118 (D.S.C. 1978):

> [I]n order for an act to be unlawful under s 301, it must involve (1) the Addition of a Pollutant into Navigable waters (2) from a Point source (3) by a Person.

Id. at 125 (emphasis added). This definition coincides with 33 U.S.C. § 1362(11): "The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . . .' (Emphasis added.) Effluent limitations generally are embodied in permits that regulate discharge sites or point sources at a facility. Violations of the standards of performance generally occur when a company or facility exceeds the effluent limitations established in permits and permit limitations applying to a particular "point source" within any new source or facility.

This Court adopts the reasoning of Sierra Club v. Shell Oil Co., 817 F.2d 1169 (5th Cir. 1987), where that court stated:

> A "point source" means the point of discharge of the pollutant-containing effluent. Effluent

> limitations, which were developed for entire industrial categories or subcategories, are transformed into limitations on individual plants within the category or subcategory by incorporation into the terms and conditions of NPDES discharge permits. If a discharger is in compliance with the effluent limitations contained in its NPDES permit, it is deemed to be in compliance with The Clean Water Act.
>
> One industrial facility may have numerous point sources of discharge. . . . [W]hen determining whether a permit-holder has violated an effluent limitation, one must look at each parameter within each point source independently.

Id., at 1173 (citations omitted)(emphasis added).

C. **Notice.**

In addition to losing the "point source" argument, Atlantic also loses on "notice," although this is a close case. It is undisputed that Atlantic's two notices to sue of November 8, 1988, and April 13, 1989, do not specifically mention point source/outfall No. 4. In the November 8, 1988, notice, reference is only made to Stroh's failure to comply with NPDES as it relates to point sources or outfalls Nos. 1 and 3.

It states in pertinent part:

> This lawsuit will allege that the Milwaukee County plant of Stroh Die Casting Company, Inc., which discharges into Bluemound Tributary of the Menomonee River via a storm sewer and is located in Milwaukee, Wisconsin, has violated and continues to violate an "effluent standard or limitation," Section 505(a)(1)(A) of the Clean

> Water Act, by not complying with its NPDES (Section 402) permits WI 0042285 in the following respects: . . . .

In addition to referencing violations related to outfall No. 3, Atlantic's April 13, 1989, notice states:

> This lawsuit will allege that the Milwaukee County plant of Stroh Die Casting Company, Inc., which discharges process water into Lake Michigan via the Milwaukee Metropolitan Sewerage District, and which is located in Milwaukee, Wisconsin, has violated and continues to violate an 'effluent standard or limitation,' by discharging die casting process waste-water to MMSD since October 31, 1988, without a pretreatment discharge permit and in violation of the categorical standards set forth in 40 C.F.R. Chapter 464.

Stroh asserts that this is not enough. While admitting violations at outfall No. 4, Stroh argues:

> [I]t is clear that neither notice provided by Atlantic included "(1)" sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated. [And] Atlantic's notices, on their face, fail to meet this element as they apply to either the discharges, permit, identification or separate permit limitation of point source/outfall No. 4.

(Stroh Opposition Brief at 16.)

Absent such a notice as to point source/outfall No. 4, the important policy supported by this prerequisite would be defeated.

> One of the major purposes of the notice provision is to allow for possible administrative resolution prior to filing suit. Since the notice is jurisdictional, such a significant omission divests this Court of the authority to further proceed with an adjudication of this matter . . . .

South Carolina Wildlife Federation, 457 F.Supp. at 124 (D.S.C. 1978)(emphasis added).

Atlantic argues that, under the facts of this case, the 60-day notice requirement must be "interpreted flexibly" and must not be 'subject to technical or formalistic" requirements. In support of its position, Atlantic offers the authority of Proffitt v. Commissioners, Township of Bristol, 754 F.2d 504 (3rd Cir. 1985). Proffitt involved allegations of violations of the Water Pollution Prevention and Control Act at the defendant's sewerage plant. Proffitt filed an amended complaint on the same day he sent notice of the alleged violation to the various defendants, the Environmental Protection Agency ("EPA"), and the Pennsylvania Department of Environmental Resources ("DER"). Even though Proffitt did not give 60-day notice prior to filing suit, the court found there was "notice in fact" or "actual notice" which defeated defendant's jurisdictional argument. The court found evidence that all defendants knew of the violation and had discussed the violations with Proffitt before he filed his suit and notice.

Proffitt appears to have been overturned by the Supreme Court in Hallstrom v. Tillamook County, 493 U.S. 20 (1989), where failure to technically comply with a 60-day notice requirement under the Resource Conservation and Recovery Act ("RCRA") (identical to the notice requirement under consideration here) resulted in dismissal. In Hallstrom, the plaintiff, while giving the allegedly offending landfill operators the requisite 60-day notice, failed to notify the State of Oregon or the EPA as required. The Supreme Court rejected plaintiff's contention that since the actual offender was placed on proper notice "the 60-day

notice provision should be subject to equitable modification and cure." Id. at 27. However, the court determined that the notice provision was not subject to a "flexible or pragmatic construction." Id., at 26. To plaintiff's argument that "giving effect to the literal meaning of the notice provisions would compel 'absurd or futile results," Id. at 29, and would "defeat Congress' intent," Id. at 23, the Hallstrom Court responded:

> [R]equiring citizens to comply with the notice and delay requirements furthers Congress' goal of striking a balance between encouraging citizen suits and avoiding burdening the federal courts with excessive numbers of such suits, since notice allows government agencies and alleged violators to achieve compliance without the need for suit. Petitioners' assertion that giving effect to the literal meaning of the notice provisions would allow violations to go unchecked during the 60-day waiting period is not persuasive, since this problem results from the balance knowingly struck by Congress in developing the citizen suit provisions, and since it is likely that compliance with the notice requirement will trigger appropriate federal or state enforcement actions to prevent serious damage.

The Hallstrom Court concluded that the "notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the [] citizen suit provision," Id. at 31, and that "[t]he equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' failure to take the minimal steps necessary' to preserve their claims." Id. at 27.

The Hallstrom Court suggests that the minimal effort required to give proper notice will not thwart the access of citizens to the courts (particularly sophisticated citizens like Atlantic) and

is the least costly way to preserve the other important policies embodied in the statute. These are to encourage possible administrative resolutions prior to filing suit and to "avoid [] burdening the federal courts with excessive numbers of citizen suits." Id. at 29. Hallstrom's strict interpretation of the 'notice and delay' requirements are fatal to Atlantic.

Atlantic cites to National Wildlife Fed'n v. Consumers Power Co., 657 F.Supp. 989 (W.D. Mich. 1987), as an example of an actual notice standard that fits the facts of this case. The court there stated:

> This is not a case where the plaintiff either failed entirely to give notice to the appropriate persons (Hallstrom) or instituted suit prior to the expiration of the sixty-day waiting period (Proffitt) . . . . In this case, rather, plaintiff gave timely and substantially complete, if not complete, notice to the appropriate persons. Since plaintiff has sufficiently alleged and established the actual notice that the statute and the regulations require, the Court will reject this aspect of defendant's motion.

Id. at 998 (citations omitted)(emphasis added).

Even if the notice was "not complete," Atlantic argues, it gave actual notice to Stroh of Stroh's violations. Admitting that it did not specifically mention point source/outfall No. 4 in either of its notices, Atlantic asserts that the April 13, 1989, letter was sufficient because of the context within which the notice occurred. The second notice letter references discharges of "process water into Lake Michigan via the Milwaukee Metropolitan Sewerage District" and that Atlantic [sic] "has violated and continues to violate an "effluent standard or limitation" by discharging die casting process waste-water to MMSD since October 31, 1988,

without a pretreatment discharge permit and in violation of categorical standards set forth in 40 C.F.R. Chapter 464."

This information was given to Stroh at a time when Stroh was correcting its discharge from point sources/outfalls Nos. 1 and 3, which emptied into the Bluemound Tributary of the Menomonee River, by re-routing these offending discharges to outfall No. 4 which emptied into Lake Michigan via the MMSD[1]. Stroh thus

[1] The following is excerpted from the Sewalish deposition of September 9, 1992, pages 52-54:

> Q: Now, Mr. Sewalish, is it correct that what you've described to me as a history of Stroh Die Casting in which some of the wastewater previously discharged via storm water through outfalls one or three under the Wisconsin DNR permit were rerouted sometime in 1990 to be discharged to the Milwaukee Metropolitan Sewerage District via sanitary sewer?
>
> A: Correct.
>
> . . .
>
> Q: Okay. If we look, for example, to outfall three as defined in your initial MMSD's permit, wastewater that was discharged through that outfall under the initial permit has subsequently been discharged and measured through a different outfall under your revised permit, --
>
> A: Correct.
>
> Q: -- correct? Okay. It's the same wastewater mixed with additional water from other sources, correct?
>
> A: Three waste streams are combined into one, correct.
>
> Q: Okay. You have not ceased discharging the wastewater which used to be discharged at old outfall three, correct?
>
> A: Correct.
>
> Q: Okay. You have, as you said, rerouted it and combined it with the discharge from other waste streams and now discharge and measure it at outfall four, correct?
>
> A: Going through a waste treatment process prior to discharge, correct.

(Emphasis added.)

knew, or should have known, that the April 13, 1989, notice objecting to discharge into Lake Michigan via the MMSD could become the basis of a legal action and that point source No. 4 would be the subject of that action. Stroh was thus on actual notice that Atlantic intended to sue for those discharges into the MMSD even though point source/outfall No. 4 was not directly named.

Given these facts, it would be unnecessary, argues Atlantic, to give another 60-day notice by specifically referencing outfall No. 4 and amending the complaint accordingly. But Hallstrom, given its vision of the policies embodied in the statutes, appears to hold otherwise. Hallstrom suggests that this is a minimal effort to make in light of the policies harmed by a failure to make it.

As the Sewalish affidavit makes clear, at the time of the second notice Stroh was attempting to resolve the discharge problems at point sources Nos. 1 and 3 by redirecting it through a "waste treatment" system that ultimately discharged into point source No. 4. (As the record and this decision reflects, Stroh did resolve its violations at point sources Nos. 1 and 3.) Atlantic lists a long series of violations since July 1, 1990, at point source No. 4. It highlights a letter dated May 29, 1990, from Stroh's manufacturing engineer Eric Silas to the MMSD indicating Stroh's failure to meet its deadline for start up of the wastewater treatment system as evidence of Stroh's inability to correct what was an ongoing problem. Stroh concedes these violations in as much as they are based on its own monitoring reports to the MMSD. All of this was known to both parties. What is not known is whether Stroh and the MMSD would have taken additional, different, and/or quicker steps to resolve these problems at point source No. 4 had point source No. 4 specifically been mentioned in Atlantic's earlier notice (as was the case with point sources Nos. 1 and 3) or in a subsequent notice.

Stroh and the MMSD should have been given that chance. Atlantic had easy access to all the records of Stroh's violations. The imposition on Atlantic to give specific notice as to violations at another point source and file an amended complaint was minimal in light of the important goals that may have been achieved by that notice (i.e., remedy of the violations and avoidance of a lawsuit.)

Like the Hallstrom plaintiff, Atlantic believes that such an approach would compel "absurd or futile results." The reverse is true. This approach, according to Hallstrom, strikes the appropriate balance "between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits," Hallstrom, 493 U.S. at 29, since notice allows government agencies and alleged violators to achieve compliance without the need for suit. Atlantic could easily have preserved its claims at any time subsequent to the deficient second notice by simply reviewing Stroh's records, putting them on a specific notice as to point source No. 4, and filing an amended complaint. Because it did not do so, its claim as to point source/outfall No. 4 cannot be considered by the Court and must be dismissed.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Stroh's motion for summary judgment is **GRANTED.**

2. Case No. 89-C-100 is **DISMISSED.**

Dated at Milwaukee, Wisconsin, this 22nd day of March, 1996.

SO ORDERED,

HON. RUDOLPH T. RANDA
U.S. DISTRICT JUDGE

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2063

ATLANTIC STATES LEGAL FOUNDATION, INC.,
Plaintiff-Appellant,

v.

STROH DIE CASTING CO.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 89-C-100 -- Rudolph T. Randa, Judge

Argued Oct. 21, 1996.

Decided June 17, 1997.

Before MANION, DIANE P. WOOD, and EVANS, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

Although this environmental case has been pending since 1989, during most of its life it has languished in the court. In the meantime, not surprisingly, the conditions about which the citizen plaintiffs originally complained have changed, perhaps substantially. It began when the Atlantic States Legal Foundation filed it as a citizen suit under the Federal Water Pollution Control

Act (or Clean Water Act), 33 U.S.C. § 1365, seeking relief for past violations of National Pollutant Discharge Elimination System (NPDES) permits by the Stroh Die Casting Company in Milwaukee. Believing the statutory notice that Atlantic provided to Stroh insufficient to encompass its complaint about the principal point source at issue here, and further finding that no reasonable jury could conclude that Stroh was an "intermittent or continuous" violator with respect to the two other point sources Atlantic identifies, the district court granted Stroh's motion for summary judgment and dismissed Atlantic's suit. In our view, the district court read Atlantic's notice too narrowly. Furthermore, its conclusion that at the time the suit was filed Stroh was not at least an intermittent violator for one of the contested outfalls is inconsistent with the Supreme Court's decision in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). We therefore reverse and remand.

I

Stroh produces zinc and aluminum castings at its Milwaukee plant. In the course of its operations, it discharges industrial wastewater through various outfalls to sanitary or municipal sewers run by the Milwaukee Metropolitan Sewerage District (MMSD), which eventually empty into Lake Michigan. It also discharges "non-contact cooling water," which is heated tap water, through storm sewers regulated by the Wisconsin Department of Natural Resources (WDNR) into the Bluemound tributary of the Menomonee River. As of November 1988, Stroh had a WDNR permit that allowed it to discharge the "non-contact cooling water" into the Bluemound, but it had no permit at all to discharge zinc- and phenol-contaminated industrial wastewater into the MMSD sanitary sewerage system.

This prompted Atlantic, an environmental organization with Wisconsin members, to send a letter on November 8, 1988 giving Stroh notice of violations of its WDNR discharge permit.

(Despite the implication from its name that Atlantic had little connection with the Great Lakes, the complaint alleged that members of Atlantic resided in Wisconsin, in the vicinity of Lake Michigan, or they owned property or used Lake Michigan for recreational purposes, and thus were affected by Stroh's discharge of pollutants into the Lake. Stroh did not challenge Atlantic's standing to sue in any of its motions for summary judgment.) Under 33 U.S.C. § 1365(b), Atlantic had to give Stroh notice at least 60 days prior to suing it for those violations. The November 1988 notice alleged that Stroh had several times exceeded the daily maximum discharge limits for oil, grease, and biological oxygen demand 5 (BOD5) allowed under the WDNR permit for WDNR outfalls (discharge points) 1 and 3. On January 23, 1989, Atlantic filed a complaint against Stroh based on the November 1988 notice. Stroh moved shortly thereafter to dismiss Atlantic's claims for lack of subject matter jurisdiction, claiming that it was not "in violation" of the statute at the time of suit, because it was neither a continuous nor an intermittent violator as required by Gwaltney.

Rather than submitting a brief in opposition to Stroh's motion to dismiss, Atlantic chose on April 13, 1989, to send Stroh a second 60-day notice of intent to sue. The April 1989 notice alleged that Stroh had exceeded its maximums for zinc, phenol, oil and grease on several occasions at WDNR outfall 3. The April notice also alleged that Stroh had been discharging die casting process wastewater to the MMSD sanitary sewers since October 31, 1988, without a pretreatment discharge permit and in violation of the categorical standards of 40 CFR Chapter 464. It itemized certain specific violations at MMSD outfall 3 (not to be confused with the WDNR storm sewer outfall 3 that was the subject of the first notice) and accused Stroh of a "history of effluent standard violations." Stroh's own records, the notice claimed, showed that its discharges were not in compliance as of January 31, 1989, and that compliance was not expected until January 10, 1990. It concluded that "[s]uch violations are known to the Discharger and may be included in future legal actions by Notifier."

Stroh responded by obtaining an MMSD permit on July 28, 1989, that authorized it to discharge die casting wastewater to MMSD sewers through Stroh's Abcor treatment unit. At this point, the designation of outfalls becomes somewhat confusing, because the MMSD outfalls defined under the July 1989 permit were different from the identically numbered outfalls covered by the WDNR discharge permit described in Atlantic's November 1988 notice. Stroh's MMSD permit defined the following outfalls:

> MMSD Outfalls 1.1, 1.2, and 1.3: handled discharges from the parts washer conversion coating, a three-stage washer that discharged each tank separately
> MMSD Outfall 2: handled domestic waste only, unlimit ed under the MMSD permit
> MMSD Outfall 3: handled discharge from the Abcor un it, which treated waste from die casting, mold cooling leakage, casting quench, and machining
> MMSD Outfalls 4.0, 4.1, and 4.2: 4.0 was the sump pit through which wastewater from the parts washer and the deburring operation were directed; 4.1 and 4.2 were the batch discharges from the two-stage parts washer
> MMSD Outfall 5: handled cooling water only, unlimite d under the MMSD permit

Stroh's MMSD monitoring summary showed that it was not able consistently to meet the discharge limitations for zinc that applied to MMSD outfall 3, as violations occurred in June 1989 and October 1989.

Meanwhile, back in the district court, nothing was happening with the lawsuit. On the assumption that the case had been settled, the district court entered an order dismissing Atlantic's suit without prejudice on November 14, 1989, noting that it had not filed a brief responding to Stroh's motion to dismiss and had thus waived the right to do so under the court's local rules. Six months later, on May 7, 1990, Atlantic filed an amended complaint, which the district court accepted, reopening the case on

May 8, 1990. Stroh moved to vacate the order reopening the case and to dismiss Atlantic's amended complaint, but the court took no action on the motion for two years. On April 16, 1992, Judge Warren, before whom the case had been pending, denied Stroh's motions. Later in 1992, both parties filed motions for summary judgment. Another four years passed, by which time the case had been transferred to Judge Randa. On March 22, 1996, he granted Stroh's motion for summary judgment dismissing the amended complaint and denied Atlantic's motion. This time, final judgment was entered on the order of dismissal on March 26, 1996 and this appeal followed.

Time was not standing still between 1990 and 1996, however, even if the case was. On May 29, 1990, shortly after Atlantic filed its amended complaint, Stroh wrote to the MMSD explaining why it had failed to meet the April 10, 1990, deadline for starting up its wastewater treatment system. It conceded that it was not in compliance with the MMSD permit at that time, but it expressed the hope that the new system would cure the problem. Then, on July 1, 1990, something reminiscent of the game of hiding a pea under one of several cups occurred. On that date, Stroh abandoned existing MMSD outfall 3 (which was the outfall mentioned in the April 1989 notice and the MMSD permit) and re-routed its industrial process wastewater to "outfall 4," necessitating the issuance of a modified MMSD permit in October 1990 to reflect the changes. The new outfall 4 was not the same outfall 4 that the July 1989 MMSD permit had described, however. Recall that the July 1989 MMSD permit labeled "outfalls 4.0, 4.1, and 4.2" as the sump pump from the parts washer and deburring operations and the batch discharges from the parts washer itself. By contrast, the October 1990 modified MMSD permit retroactively relabeled "outfall 4" as the sampling station located downstream of Stroh's pretreatment system. The discharge from the Abcor unit, which had formerly gone through MMSD outfall 3, was rerouted first through the new (but as yet inoperative) wastewater treatment system, where the zinc and phenols were to

be removed, and then it was to be piped to the new, single MMSD outfall 4.

Samples taken from the new outfall 4 in July 1990 showed continued violations of effluent standards for zinc, lead, and phenols. MMSD issued notices of noncompliance to Stroh relating to discharges from the new outfall 4 in October 1990, November 1990, January 1991, and June 1991. MMSD then published a notice in the Milwaukee Journal on March 29, 1992, which listed Stroh as one of 15 industrial users that were in significant noncompliance with applicable effluent discharge standards during 1991.

Last, returning to the WDNR storm sewer system, Atlantic presented evidence indicating that Stroh continued to discharge nonprocessed water into the Bluemound tributary in violation of its WDNR permit. A Discharge Monitoring Report, whose accuracy Stroh contests, was received by the WDNR on April 16, 1992, in which Stroh reported discharging 11 milligrams per liter of oil and grease at WDNR storm sewer outfall 3 on February 6, 1992, which was 1 milligram over the per liter daily maximum allowed under its permit. Based on this contested evidence, Atlantic claims that the district court should not have dismissed its claims relating to WDNR outfalls 1 and 3.

II

Although the facts are somewhat complicated (made more so by the proliferation of outfalls that seem to have the same number until one takes a more careful look), the legal questions in this case are fairly straightforward. The first and most important question is whether Atlantic's April 1989 notice satisfied the jurisdictional prerequisite imposed by the Clean Water Act, 33 U.S.C. § 1365(b), for Atlantic's citizen suit about industrial discharges into the MMSD system. Within that general issue are three subsidiary points: first, was Atlantic's April 1989 notice specific enough about the alleged violation to encompass its claims

about what eventually became new outfall 4; second, was Stroh at the time suit was brought a "continuing or intermittent" violator of the Act such that Atlantic would then have been entitled to an injunction; and third, what is the effect, if any, of the long delay between the November 1989 dismissal without prejudice (on which no Rule 58 final judgment was ever entered) and the district court's discretionary decision to accept the filing of the amended complaint in May 1990? The final question relates to the district court's decision to grant summary judgment on Atlantic's claims relating to WDNR outfalls 1 and 3. On these claims, Stroh concedes that Atlantic's notice was adequate to confer subject matter jurisdiction, but it persuaded the district court that Atlantic had not presented enough evidence of violations to survive summary judgment.

A. The MMSD Claims

The Clean Water Act allows private citizens to sue any person "alleged to be in violation" of the conditions of an effluent standard or limitation under the Act or of an order issued with respect to such a standard or limitation by the Administrator of the Environmental Protection Agency (EPA) or a state. See 33 U.S.C. § 1365(a)(1). It is unlawful to discharge pollutants without any permit, see 33 U.S.C. § 1311(a); Rueth v. United States E.P.A., 13 F.3d 227, 229 (7th Cir.1993); Hoffman Homes, Inc. v. Administrator, United States E.P.A., 999 F.2d 256, 260 (7th Cir.1993), just as it is unlawful to discharge pollutants in violation of the terms of an existing NPDES permit, see 33 U.S.C. § 1342(a); see generally Arkansas v. Oklahoma, 503 U.S. 91, 105, 112 S.Ct. 1046, 1056, 117 L.Ed.2d 239 (1992) (outlining federal and state permitting scheme). Citizens may not bring suit, however, unless and until they have given 60 days' notice of their intent to sue to the alleged violator (as well as to the Administrator and the state). 33 U.S.C. § 1365(b)(1)(A). The purpose of this notice requirement, the Supreme Court explained in Gwaltney, "is to give [the alleged violator] an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a

citizen suit." 484 U.S. at 60, 108 S.Ct. at 383. See also Citizens for a Better Environment v. Steel Co., 90 F.3d 1237, 1242 (7th Cir.1996) (explaining Gwaltney), cert. granted, --- U.S. ----, 117 S.Ct. 1079, 137 L.Ed.2d 214 (1997). EPA regulations give further guidance on the contents of the notice, at 40 CFR § 135.3(a):

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto , shall include sufficient information to permit the recipi ent to identify the specific standard, limitation, or order alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit.

In this case, Atlantic claims that its April 1989 notice clearly informed Stroh that it was complaining about Stroh's unauthorized discharges of die casting process wastewater to the MMSD sewers. The fact that Stroh later (1) obtained a permit covering those discharges from outfall 3, and then (2) re-routed the discharges to the newly defined outfall 4 after it built its treatment facility, does not change the adequacy of the original notice. Indeed, if anything it suggests that Stroh knew exactly what Atlantic was concerned about and it was actively taking steps to address the matter. Stroh, for its part, argues that the April 1989 notice specifically mentioned MMSD outfall 3, which had been closed down by the time the amended complaint (which was the first one to raise claims about discharges into the MMSD system) was filed in April 1990. Since Stroh had never received any notice mentioning new MMSD outfall 4 as a noncomplying "point source" for purposes of the Act, it reasons that Atlantic failed to meet the jurisdictional threshold for a citizen suit.

The premise of Stroh's argument is that the §1365(b)(1)(A) notice must specifically identify the point source from which the allegedly offending discharge is emerging before the Act's jurisdictional requirements will be met. It relies on Hallstrom v. Tillamook County, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989), for this proposition, which held that compliance with the 60-day notice provision of the Act is a mandatory precondition to suit that cannot be disregarded by the district court. Hallstrom, however, said nothing about the content of the notice. It was undisputed that the plaintiffs there had given no notice at all to either Oregon's Department of Environmental Quality or the Administrator of the EPA, both of whom are clearly entitled to notice under the statute. Stroh's claim here is not that Atlantic failed to send its notice to one of the parties entitled to receive it; it is instead that the April 1989 notice was not specific enough to alert it to the claimed violation, and thus for purposes of new MMSD outfall 4 it was the equivalent of no notice at all.

With respect to content, Stroh argues that nothing less than a specific identification of the offending outfall would have sufficed. It finds support for this proposition in the Third Circuit's decision in Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 50 F.3d 1239 (3d Cir.1995), which held that a citizen plaintiff's initial notice of discharge violations was broad enough to encompass additional discharge violations and monitoring, reporting and record keeping violations occurring after the date of the notice letter. The claims, however, would have to be of the same "type" for this rule to hold, as the court explained:

> [W]e hold that a notice letter which includes a list of discharge violations, by parameter, provides sufficient information for the recipients of the notice to identify violations of the same type (same parameter, same outfall) occurring during and after the period covered by the notice letter.

50 F.3d at 1250. The court went on to say that the citizen's burden was "to provide sufficient information of a violation, such as an excessive discharge, so that the permit holder and the agency can identify it." Id. at 1252. If subsequent investigation reveals a violation, then the court found that " 'complete compliance' should incorporate the correction of all such interconnected violations." Id.

We do not read the Third Circuit as establishing an inflexible rule that would require outfall-by-outfall notice in all cases. It was not faced with a case where the alleged polluter, upon receiving a notice about one offending outfall, simply redirected the stream of contaminated water to another outfall. The key to notice is to give the accused company the opportunity to correct the problem. Here, there is no question that Atlantic's April 1989 notice sufficiently informed Stroh about Atlantic's claim that its handling of the die casting wastewater did not comply with the statute. Stroh promptly secured a permit that covered exactly these discharges, under the outfall numbered 3 in the first MMSD permit. It began construction of a treatment facility, which it completed in June of 1990 (at least a month after the amended complaint was filed). It then re-routed the very same die casting wastewater to its newly numbered outfall 4. Moreover, it admitted in its May 29, 1990 letter to the MMSD that it was not in compliance and attempted to explain why it missed its deadline for its wastewater treatment system. These are not the actions of a company that has not received enough information for purposes of the statutory notice provisions of the Act. Nothing in the statute says that plaintiffs must refrain from filing suit when the company is attempting to take corrective action. Even though Atlantic did not file its amended complaint until well after the expiration of the minimum 60-day statutory waiting period (and thus eleven months after it could have sued), we find that the April 1989 notice satisfied the jurisdictional requirements of the statute.

Even if the notice was broad enough in scope and was timely, a second requirement for citizen suits is that the defendant

must be "in violation" of a relevant standard, limitation, or order. In Gwaltney, the Supreme Court held that "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation--that is, a reasonable likelihood that a past polluter will continue to violate in the future." 484 U.S. at 57, 108 S.Ct. at 381. The Court held that this language precluded the possibility of a citizen suit based on a wholly past violation; instead, the plaintiff must allege that the violations are ongoing at the time suit is brought. Justice Scalia would have gone further on the latter point and would have required the plaintiff to substantiate an allegation of an ongoing violation, if the point was contested. See Gwaltney, 484 U.S. at 69, 108 S.Ct. at 387. He agreed, however, that "[a] good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated." Id. Furthermore, he noted, without contradiction from the majority, that "it does not suffice to defeat subject-matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed." Id.

If the violation is cured at some point while the suit is pending, which for all we know may have occurred in this case, the case nevertheless does not become moot. It may be possible that the citizen plaintiffs would lose their right to an injunction, if, as the Gwaltney majority put it, "it is 'absolutely clear' that the allegedly wrongful behavior could not reasonably be expected to recur." (Emphasis in original; quoting from United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968).) In addition to injunctive relief, however, the statute provides for civil penalties under 33 U.S.C. § 1319(d), which would be recoverable for any time period in which Stroh was found to be in violation. Thus, if Atlantic adequately alleged that Stroh was either a continuous or intermittent violator at the time of suit--which we again take to be the date of the amended complaint--it has satisfied this prerequisite

for suit as well. Accord Atlantic States Legal Foundation Inc. v. Tyson Foods Inc., 897 F.2d 1128, 1135 (11th Cir.1990).

Looking only at the allegations, which would be pertinent to a motion under Fed.R.Civ.P. 12(b)(6), it is easy to conclude that Atlantic adequately alleged that Stroh was "in violation" of the Act in the sense that Gwaltney used the term. For purposes of summary judgment, though, we think that the question whether the defendant was in violation at the time of the suit is one of fact. In keeping with the majority's decision in the Supreme Court to require the plaintiff only to allege in good faith the present nature of the violation, the Fifth Circuit has concluded that the burden of coming forward with evidence to show that the plaintiff's allegation is false rests on the defendant at the summary judgment stage. See Carr v. Alta Verde Indus., Inc., 931 F.2d 1055 (5th Cir.1991). At the trial, of course, the burden of proving the ultimate violation rests on the plaintiff, because at that point the violation is an element of the substantive case rather than a jurisdictional hurdle.

We think the Fifth Circuit's approach sensibly accommodates the Gwaltney holding and the nature of summary judgment practice. Here, Stroh made no showing that Atlantic's allegations of the violations in connection with its discharges of die casting wastewater were not made in good faith, and it is clear that if the notice encompasses new outfall 4, the violation had certainly not ceased by the time the amended complaint was filed.

This leaves only the effect of the various delays in this proceeding on Atlantic's ability now to proceed with its suit. As we noted above, the delay has not made the case moot. Stroh realizes that the district court had discretion to consider whether to accept the filing of the amended complaint six months after it had dismissed the original complaint. See Fed.R.Civ.P. 15(a); Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir.1994). Bearing in mind both the breadth of that discretion and the fact that Stroh itself could have moved at any point after the November 14, 1989,

order of dismissal for entry of a Rule 58 final judgment (but did not), we are not inclined to second-guess the district court's handling of the case. The greater part of the delay occurred between the filing of the new motions for summary judgment in 1992 and the new district judge's ruling in 1996. While this is certainly regrettable, Atlantic is no more responsible for this desuetude than Stroh (or the court). We therefore conclude that Atlantic is entitled to go forward on its claims relating to the discharges of die casting wastewater into the MMSD sewerage system.

B. The WDNR Claims

The district court dismissed Atlantic's claim relating to discharges at WDNR outfalls 1 and 3 because it found that a laboratory letter reporting that too much oil and grease had been discharged at outfall 3 in February 1992 was based on a faulty test. Stroh alleged that the sample result was in error, claiming that its Discharge Monitoring Report on which the excess discharge was reported had also contained the following notation: "Note: Attached lab report shows lab process error." No such report was ever found in WDNR's files. Stroh then submitted a letter dated May 13, 1992, from the laboratory that performed the test, which said:

> As part of the method, an oil standard of known concentration is analyzed along with the samples to determine the accuracy of the analyses. The standard th at was run on February 27 had a recovery of 50%. This is below our acceptance level. This could indicate that there was a problem with the O & G analyses that day, meaning that the results for your two samples tested that day may not be accurate.

Taking both the May letter and the lab report into account, the district court concluded that Atlantic had not met its summary judgment burden of coming forward with evidence to show that

Stroh was indeed a continuing or intermittent violator of the WDNR permit covering WDNR outfalls 1 and 3.

We note initially that the record appears to be devoid of any evidence from Atlantic that relates to WDNR outfall 1. The district court therefore correctly dismissed Atlantic's claims relating to that outfall from the case. With respect to WDNR outfall 3, the case is much closer. On the one hand, as Atlantic points out, the lab letter, taken in the light most favorable to Atlantic, implies that the flaw in the data led to an under-reporting of the actual levels of oil and grease, not to an excessive report. From that perspective, Stroh may have exceeded its permissible limits by 2 or 3 milligrams, rather than the 1 milligram that the lab found. On the other hand, Atlantic does not direct us to any other evidence in the record that suggests either continuous or intermittent violations at WDNR outfall 3. We must therefore decide whether the lab report, taken alone, is enough to defeat Stroh's motion for summary judgment.

Bearing in mind both the court's obligation on summary judgment to view the facts in the light most favorable to the party opposing the motion, and the legal requirement for the company to show that it had "clearly achieved the effect of curing all past violations by the time suit was brought," Gwaltney, 484 U.S. at 69-70, 108 S.Ct. at 388 (Scalia, J., concurring), we think Atlantic should have been entitled to proceed on its claims regarding WDNR outfall 3. If Stroh discharged excess oil and grease into the Bluemound tributary on one occasion after the date of the suit, a finder of fact could infer that Stroh had not fully cured all past violations by the time suit was brought. It is unclear how much relief this will bring for Atlantic, if the provable violations are so sparse, but that goes to the merits of the suit, not to the jurisdictional threshold.

We therefore AFFIRM the district court's dismissal of Atlantic's claims with respect to WDNR outfall 1, and we REVERSE and REMAND for further proceedings with respect to

WDNR outfall 3 and the claims regarding the die casting wastewater that was routed to new MMSD outfall 4. Each party is to bear its own costs on appeal.

MANION, Circuit Judge, concurring in part and dissenting in part.

Although I agree that the dismissal of Atlantic's claims with respect to WDNR outfall 1 should be affirmed, I do not concur with the court's reversal of the district court's dismissal of claims with respect to outfall 3. In my opinion the court reads the notice and continuing violator requirements of the Clean Water Act, 33 U.S.C. § 1365 et seq., too broadly. Accordingly, I would affirm the district court's dismissal of Atlantic's claims in total.

I.

Stroh Die Casting Company manufactures zinc and aluminum castings in its Milwaukee, Wisconsin plant. The Wisconsin Department of Natural Resources ("WDNR") has issued Stroh permits to discharge industrial wastewater through various outfalls into storm sewers which flow into Lake Michigan.

The Clean Water Act enables citizens to seek injunctive relief, civil penalties, and forfeitures (as well as attorneys' fees) if violations of the Act are proved. Atlantic States Legal Foundation claims that Stroh violated the Act. In a November 8, 1988 letter from its law firm, Atlantic gave Stroh notice of its intent to sue in 60 days for certain purported violations of the Act, as 33 U.S.C. § 1365(b) requires Atlantic to do. In that notice, Atlantic alleged that Stroh had exceeded the daily maximum discharge limits for oil, grease, and "biological oxygen demand 5" allowed under the WDNR permit for WDNR outfalls 1 and 3. Nearly 3 months later, Atlantic filed suit against Stroh based on the notice. Pursuant to Fed.R.Civ. P. 12(b)(1), Stroh moved to dismiss Atlantic's claims for lack of subject matter jurisdiction, arguing that Atlantic could not satisfy the requirements for a citizen suit

under 33 U.S.C. § 1365(a) because any violations of the Act occurred in the past; Atlantic had failed to allege a state of continuing pollution, an impediment to recovery under the Act after Gwaltney v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57, 64, 108 S.Ct. 376, 381, 385, 98 L.Ed.2d 306 (1987).

Rather than opposing Stroh's motion to dismiss, on April 13, 1989, again in a letter from its law firm, Atlantic sent Stroh a second 60-day notice of intent to sue. That letter alleged Stroh had exceeded the maximum allowances for zinc, total phenol, and again for oil and grease, as well as that Stroh discharged diecasting wastewater into Milwaukee Metropolitan Sewerage District ("MMSD") sewers without a permit. As a location for this discharge, the second notice mentions only "outfall 003"; the parties agree this refers to MMSD outfall 3. Three months later, the MMSD did issue Stroh an industrial wastewater discharge permit which defined five separate outfalls and set their effluent limitations. Under that permit, Stroh continued to discharge its industrial wastewater through MMSD outfalls 1, 3, and 4. After July 1989, these outfalls were monitored, tested, and reported to the MMSD.

Because Atlantic never responded to Stroh's motion to dismiss and thus had waived the right to do so, the district court dismissed Atlantic's suit without prejudice on November 14, 1989. Over six months later, on May 7, 1990, Atlantic filed an amended complaint alleging the same violations noticed in the April 13, 1989 letter. The district court accepted the filing, reopening this case.

In the meantime, Stroh had been designing and installing a new wastewater treatment system for its plant. In May 1990, Stroh wrote the MMSD explaining that it had failed to comply with an April 10, 1990 deadline for completing the new system because of a personnel difficulty, late delivery of the new system from the manufacturer, and installation problems. In June 1990, Stroh completed the installation of the new system, which combined the

wastewater previously discharged at MMSD outfalls 1 and 3 with that discharged at MMSD outfall 4, pumped it through an ultrafiltration unit to extract all grease and oil, then through a pretreatment system, and then discharged the water only from MMSD outfall 4. MMSD outfalls 1 and 3 were later used for expelling waste and water not limited by the permit.

On October 23, 1990, the MMSD issued Stroh a new discharge permit which reflected the new outfalls and new treatment system. The last reported exceedence at WDNR outfall 3 occurred on February 27, 1990, although a February 2, 1992 laboratory test revealed that Stroh had exceeded the 10 milligrams per liter level for oil and grease at that outfall by 1 milligram. Stroh challenged the accuracy of that test, submitting a March 1992 letter in which the laboratory admitted that their oil measurements were off by 50% that day. Atlantic responded that the lab's admitted error could only cut in its favor-- that the flaw in the data would have led to under-, not over-reporting.

When Atlantic filed the amended complaint and the district court reopened the case, Stroh moved to vacate the court's ruling to reopen. The district court denied that motion, and the parties filed cross-motions for summary judgment. The district court granted Stroh's summary judgment motion, denied Atlantic's, and dismissed Atlantic's amended complaint.

II.

The court first concludes that the April 1989 (second) notice to Stroh satisfied the jurisdictional requirements of 33 U.S.C. § 1365(b)(1)(A). I agree with the district court that Atlantic failed to fulfill the statutory condition precedent by notifying the proper parties, including Stroh, of any alleged violations at MMSD outfall 4, and therefore that any such violations are beyond the scope of this suit.

The court concludes that "there is no question that Atlantic's April 1989 notice sufficiently informed Stroh about Atlantic's claim that its handling of the die casting wastewater did not comply with the statute." Ante at p. 820. It so concludes by examining Stroh's post-complaint actions: securing a permit that covered the discharges, constructing a new wastewater treatment facility, re-routing the diecasting wastewater to newly numbered outfall 4, and admitting it was not in compliance in its May 1990 letter to the MMSD. Id. The court surmises that "these are not the actions of a company that has not received enough information for purposes of the statutory notice provisions of the Act." Ante at p. 820. But "[t]he mere chronological sequence of events does not establish a causal connection." Brennan v. United Steelworkers of America, 554 F.2d 586, 614 (Aldisert, J., dissenting).

It is undisputed that Atlantic's first notice of intent to sue on November 8, 1988 did not mention discharge into the MMSD, and that the second notice on April 13, 1989 mentions only MMSD outfall 3, not MMSD outfall 4. The April 13th letter refers to discharges of "process water into Lake Michigan via the [MMSD]" and that Stroh "has violated and continues to violate an 'effluent standard or limitation' by discharging die casting process wastewater to MMSD without a pretreatment discharge permit." The letter then lists six specific examples of exceedences, each emitting from what the parties do not dispute is MMSD outfall 3. But Atlantic notified Stroh of this information when Stroh was correcting discharges from MMSD outfalls 1 and 3, not MMSD outfall 4. And Atlantic had easy access to all records of Stroh's emissions, but made no mention of MMSD outfall 4 in this second notice, while specifically mentioning MMSD outfall 3. After specifically noticing only violations at outfall 3, it is wrong to include in this suit alleged violations at MMSD outfall 4 without notice to Stroh.

The Third Circuit more properly handled a situation similar to this. In Public Interest Research Group of New Jersey v. Hercules, Inc., 50 F.3d 1239 (3d Cir.1995), citizen plaintiffs sent

out a notice of an intent to sue listing 68 discharges which allegedly occurred in violation of Hercules' permits. Id. at 1243. As in this case, the district court held that pre- complaint discharge violations not included in the plaintiffs' notice letter could not be included in the suit unless listed in a subsequent notice, and granted the defendant summary judgment. Id. at 1250. The Third Circuit reversed this holding, concluding that

> a notice letter which includes a list of discharge violations, by parameter, provides sufficient information for the recipients of the notice to identify violations of the same type (same parameter, same outfall) occurring during and after the period covered by the notice letter.

Id. (emphasis supplied). The Hercules decision supplies a workable, bright-line rule to apply in cases such as this: violations "which are of the same type (same parameter, same outfall) as the alleged violations included in the plaintiffs' 60-day notice letter," id., should be deemed properly noticed.

In attempting to distinguish Hercules, my colleagues assert the Third Circuit "was not faced with a case where the alleged polluter, upon receiving a notice about one offending outfall, simply redirected the stream of contaminated water to another outfall." Ante at p. 820. But the record does not support the metaphor that Stroh played a shell game with the regulatory authorities (and Atlantic) by constructing the new wastewater treatment. Although Stroh's new system was installed in June 1990, three weeks after the amended complaint, it was designed from late 1989 to early 1990. During that time period only the original complaint was on file, which had been dismissed for, in effect, failure to prosecute. That complaint was based on the first notice to sue, which concerned solely WDNR outfalls 1 and 3. Further, the April 1989 notice made no mention of MMSD outfall 4. The installation of highly technical wastewater treatment equipment cost Stroh hundreds of thousands of dollars and was

implemented on a schedule closely monitored by the MMSD. Its purpose was to consolidate, update, and improve Stroh's treatment of wastewater. Stroh met with sewerage district officials concerning the two month delay in installing the new system, and explained the reasons for the delay in writing. To treat all of its wastewater through the new system, Stroh combined the three existing streams (which previously had been discharged at MMSD outfalls 1, 3, and 4) and routed them through its new system, with the treated water then discharged at new MMSD outfall 4. All of these facts lead to the conclusion that Stroh methodically and effectively addressed the problem, not that it hid the pea.

It is undisputed that MMSD outfall 4 was not a new outfall through which Stroh creatively re-routed wastewater to discharge. Stroh had operated MMSD outfall 4 as a separate and distinct outfall since July 1989, and it had separate effluent limitations since the original MMSD permit. Because reports from MMSD outfall 4 were available from July 1989 onward, Atlantic had access to the information necessary to provide Stroh, the EPA, and the WDNR with an appropriate notice of intent to sue for any violations at MMSD outfall 4. Atlantic did not do so. As the Supreme Court stated in Gwaltney, "the purpose of a notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." 484 U.S. at 60, 108 S.Ct. at 383. For a notice to fulfill its function, the violator must be told what the pollution is and where it occurred. This court should not rewrite the second notice on Atlantic's behalf to encompass information it had the opportunity to but did not include.

The consequence of the court's expansive reading could be catch-all notices sent to companies which, if construed broadly as the court has done here, would encompass any violation, past or future. This, of course, would undermine the dual purposes of the notice requirement: to provide governmental entities with the opportunity to begin an enforcement action before the citizen suit is filed, and to provide the alleged violator with enough

information to be able to bring itself into compliance. See Hercules, 50 F.3d at 1249. In Hercules, the Third Circuit judged the sufficiency of the 60-day notice letter by "whether it accomplishes these purposes." Id. Because the April 13, 1989 notice letter in this case could not have given the EPA, the WDNR, or Stroh notice of a lack of compliance at MMSD outfall 4, this court should exclude from this suit any violations Atlantic alleges occurred there.

III.

Even if proper notice is given, the Clean Water Act only permits a citizen to bring a civil action if a person is "in violation" of a relevant standard, limitation, or order. 33 U.S.C. § 1365(a)(1)(A). If the person charged is not "in violation," the plaintiff does not have standing under the Act. In Gwaltney, the Supreme Court set forth a test for standing under the Act: a plaintiff must make a "good-faith allegation of continuous or intermittent violation." 484 U.S. at 64, 108 S.Ct. at 385. This means that a citizen plaintiff does not have standing to maintain a suit for civil penalties for wholly past violations of the act.[1] Thus, for purposes of federal subject matter jurisdiction, citizen plaintiffs are required to show "a reasonable likelihood that a past polluter will continue to pollute in the future." Id. at 57, 108 S.Ct. at 381. Justice Scalia, joined by Justices Stevens and O'Connor, concurred in Gwaltney on exactly this issue. Id. at 67, 108 S.Ct. at 386-87. To them, standing should not turn on the plaintiff's good faith, but on the objective fact of whether the defendant was "in violation." Id. at 69, 108 S.Ct. at 387-88.

[1] This court clearly recognized this in Citizens for a Better Environment v. Steel Co., 90 F.3d 1237 (7th Cir.1996). That case discussed how the Supreme Court in Gwaltney interpreted the present tense language of the Clean Water Act to bar suits for past violations, and how such suits would render the Act's statutory notice provision meaningless. Id. at 1242-43.

On remand in Gwaltney, the Fourth Circuit held that a citizen plaintiff may prove an ongoing violation in one of two ways:

> either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing eviden ce from which a reasonable trier of fact could find a continuing likelihood of the recurrence in intermittent or sporadic violations. Intermittent or sporadic violations d o not cease to be ongoing until the date when there is no real likelihood of repetition. . . .

890 F.2d 690, 693 (4th Cir.1989). "[E]very court thus far to consider this question" has adopted this test. Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1062 (5th Cir.1991).

The court decides that this case presents a fact question as to whether Stroh was "in violation" at the time of the suit (which I agree is the date of the amended complaint, May 7, 1990). It adopts the approach from Carr that "the defendant has the burden at the summary judgment stage to demonstrate that the plaintiff's allegations of a continuous or intermittent violation do not raise a genuine issue of material fact." 931 F.2d at 1062. The court has inserted a new "fact." Because "the [April 1989] notice encompasses new outfall 4, the violation had certainly not ceased by the time the amended complaint was filed." Ante at p. 821.

Because no violations at MMSD outfall 4 were properly noticed, this court should not conclude that any post-complaint exceedences at outfall 4 qualify Stroh as a continuing violator. Further, if Atlantic's second notice is given its proper scope not to include any exceedences at MMSD outfall 4, Atlantic does not have standing to bring this suit.

It is undisputed that the last permit exceedence at WDNR outfall 1 occurred in November 1986, 3+ years before Atlantic filed its amended complaint. At MMSD outfall 3, there has not

been a permit exceedence since June 1990, and there can be none, for since that date that outfall has been used to expel non- contact cooling water, not wastewater. Stroh's new wastewater treatment system has been permanently connected and all industrial process wastewater previously discharged at MMSD outfall 3 (which was the subject of Atlantic's April 13, 1989 notice) is discharged at MMSD outfall 4.

Atlantic argues that there is one reported exceedence at WDNR outfall 3 which was based on a faulty lab test, and that this should preclude summary judgment. Even if Atlantic is correct that any error in the lab test cuts in its favor, it has not met its burden to show that Stroh was an "ongoing or intermittent violator" at WDNR outfall 3. If those terms mean anything, they require more than the single 1 mg per liter oil exceedence identified by Atlantic. Only stretching "ongoing" and "intermittent" beyond their breaking point could a court conclude from a single, heavily disputed exceedence in February 1992 that Stroh is currently "in violation" of the Clean Water Act. Cf. Public Interest Research Group of New Jersey v. Yates Industries, Inc., 757 F.Supp. 438, 447, modified on other grounds, 790 F.Supp. 511 (D.N.J.1991) (permit holder may avoid liability at summary judgment if data in laboratory report presents direct evidence of inaccuracies). Even if Atlantic is correct that there was an exceedence in February 1992, according to the concurrence in Gwaltney, 484 U.S. at 69, 108 S.Ct. at 387-88, Atlantic must demonstrate that Stroh is in fact in violation of the Act. It should take more than an admittedly faulty lab result to satisfy this burden.

This case presents neither of the circumstances the Fourth Circuit recognized on remand in Gwaltney would prove an ongoing violation. It is undisputed that before Atlantic's notices, there were exceedences at WDNR outfall 3 and unauthorized discharge of diecasting wastewater into sewers. Between the second notice and the amended complaint, Stroh obtained a comprehensive and demanding MMSD permit concerning its wastewater discharge.

It also designed and built at its own great expense an entirely new MMSD wastewater processing facility which was put into place less than a month after Atlantic filed the amended complaint. Properly confining our review to noticed outfalls since the date of the amended complaint, there was a single, disputed exceedence of 1 milligram of oil at one outfall, the finding for which was in an admittedly erroneous lab report. These facts show Stroh "cleaned up its act," and is not reasonably likely to pollute in the future. The court's expansive reading of the "in violation" requirement places an unreasonable burden on the company. Under Gwaltney, Stroh simply does not qualify as an "ongoing violator."[2]

IV.

I concur that the dismissal of Atlantic's claims with respect to WDNR outfall 1 should be affirmed, but I would dismiss the claim with regard to WDNR outfall 3 as well due to Atlantic's lack of standing.

For all of these reasons, I would affirm the opinion of the district court in full.

[2] As the court recognizes, given that Stroh has had the new wastewater treatment system in place since June 1990, what truly may be at issue in this case is substantial attorneys' fees.

APPENDIX C

33 U.S.C. § 1365 provides, in relevant part:

Citizen Suits (a) Authorization; jurisdiction. Except as provided in subsection (b) of this section and section 309(g)(6), any citizen may commence a civil action on his own behalf --
(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.
The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

(b) Notice. No action may be commenced --
(1) under subsection (a)(1) of this section --
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

. . .

(d) Litigation costs. The court, in issuing any final order in any action brought pursuant to this section may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

. . .

(f) Effluent standards or limitation. For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act); or (7) a regulation under section 405(d) of this Act.

(g) Citizen. For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

. . .

40 C.F.R. § 135.3 provides:

Contents of notice. (a) *Violation of standard, limitation or order.* Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereof, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

(b) *Failure to act.* Notice regarding an alleged failure of the Administrator to perform any act or duty under the Act which is not discretionary with the Administrator shall identify the provision of the Act which requires such act or creates such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is alleged to constitute a failure to perform such act or duty, and shall state the full name, address and telephone number of the person giving the notice.

(c) *Identification of counsel.* The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The petitioner, Stroh Die Casting Co., Inc., pursuant to Supreme Court Rule 29, states that it has no parent or subsidiary companies.

Supreme Court, U.S.
FILED
OCT 15 1997
CLERK

No. 97-479

In The

Supreme Court of the United States

October Term, 1996

STROH DIE CASTING CO.,

Petitioner,

vs.

ATLANTIC STATES LEGAL FOUNDATION, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the federal court have jurisdiction over a citizen suit under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, where the citizen-plaintiff's notice of intent to sue identified the defendant's discharge of die casting process wastewater to the local sanitary sewer system in violation of the categorical standards of 40 C.F.R. Chapter 464, where the defendant's discharges were not in compliance prior to the filing of suit, where the defendant continued its discharges after suit was commenced, and where the defendant's remedy for the noncompliance was a pretreatment system which was not put into operation until more than 6 weeks after suit was filed and was not effective to achieve compliance until approximately one year had passed?

2. Does the federal court's jurisdiction over a citizen suit under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, extend to post-suit violations at an outfall or sampling location not specifically identified in the citizen-plaintiff's notice of intent to sue, where instead of bringing its discharges into compliance before suit was commenced, defendant waited for more than six weeks after suit was filed before installing a pretreatment system, at which time defendant began discharging the wastewater to the sanitary sewer system at a newly defined outfall, where the pretreatment system was not able to achieve consistent compliance until approximately another year had passed?

STATEMENT PURSUANT TO RULE 29.6

There are no parents or subsidiaries of Atlantic States Legal Foundation, Inc.

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I

STATEMENT OF THE CASE

This is a citizen suit brought by plaintiff Atlantic States Legal Foundation, Inc. ("Atlantic"), under the Clean Water Act, 33 U.S.C. § 1365. Plaintiff seeks relief for defendant Stroh Die Casting Co., Inc.'s ("Stroh") repeated pre- and post-complaint violations of permit limitations and federal regulations. Stroh discharges pollutants from its Milwaukee facility into Bluemound Tributary of the Menomonee River pursuant to a permit issued by the Wisconsin DNR. (AA-5; AA-26).[1] On November 8, 1988, Atlantic gave notice of Stroh's alleged violations of its DNR discharge permit as required by 33 U.S.C. § 1365(b). (AA-3; AA-14-20; AA-25) .

At some point in time, Stroh began discharging some of its wastewater via the local sanitary sewer system to the Milwaukee Metropolitan Sewerage District ("MMSD"), which discharges from its treatment works into Lake Michigan. (AA-8; AA-27). On April 13, 1989, Atlantic gave notice of Stroh's alleged violations relating to its discharges to MMSD, as required by the Act. (AA-3; AA-21-23; AA-25). That notice stated in relevant part:

> Atlantic . . . will file a civil action in federal district court, or amend the civil action already filed.
>
> This lawsuit will allege that the Milwaukee County plant of Stroh Die Casting Company, Inc., which discharges

1. References to the record are as follows: references to pages of Petitioner's Appendix are denoted (A-__, B-__, or C-__); references to the separately bound Appellant's Appendix before the Seventh Circuit are denoted (AA-__); and references to any other parts of the record are denoted (Rec.-*docket #*, and page).

> process water into Lake Michigan via the Milwaukee Metropolitan Sewerage District, and which is located in Milwaukee, Wisconsin, has violated and continues to violate an "effluent standard or limitation," by discharging die casting process wastewater to MMSD since October 31, 1988, without a pretreatment discharge permit and in violation of the categorical standards set forth in 40 C.F.R. Chapter 464. . . .

After itemizing a series of specific violations of effluent limitations at Outfall 3, the notice went on to state:

> Notifier believes and alleges that a history of effluent standard violations has continued from before the violations listed to the present. Discharger's records certify that its discharges were not in compliance as of January 31, 1989, and state that discharger proposed not to achieve compliance until January 10, 1990. Such violations are known to the Discharger and may be included in future legal actions by Notifier.

(AA-21-22).

After receiving Atlantic's notice that Stroh was unlawfully discharging its die casting process wastewater to MMSD without a pretreatment discharge permit, Stroh obtained such a permit from MMSD on July 28, 1989. It authorized Stroh to discharge die casting wastewater to MMSD through Stroh's Abcor treatment unit, with discharges to be measured at the Abcor unit sump pit defined as outfall 3, subject to specified effluent

limitations. The MMSD permit defined the sump pit for the parts washer and deburring operation as outfall 4.0. (AA-42-46).

An initial complaint brought by Atlantic, relating only to violation of the DNR permit, was dismissed without prejudice by District Judge Robert W. Warren on the court's own motion on November 14, 1989, because it appeared that neither party wished to go forward with the matter. (AA-33-38).

On May 7, 1990, Atlantic filed an amended complaint, adding allegations of subsequent violations, including those relating to Stroh's discharges to MMSD. On May 8, 1990, Judge Warren reopened this case. Stroh moved to vacate the order reopening the case and to dismiss the amended complaint. On April 16, 1992, Judge Warren denied Stroh's motions. Cross-motions for summary judgment were filed and briefed later that year.

Stroh's MMSD discharge monitoring summary showed violations of the zinc discharge limitations at outfall 3 in June 1989 and October 1989. (AA-55). On April 18, 1990, MMSD issued a notice of violation to Stroh for its failure to have adhered to a compliance schedule for installation of pretreatment facilities:

> Plans and specifications that were to have been submitted to the DNR to allow for their review by January 26, 1990 were not received by DNR until March 9, 1990. Installation of the pretreatment system was scheduled for March 29, 1990 with compliance by April 10, 1990. However DNR approval of plans and specifications was not received until March 30, 1990 and installation and compliance is not expected until late May.

(AA-56).

On May 29, 1990, Stroh wrote MMSD, explaining why Stroh had failed to meet the April 10, 1990 deadline for start up of the wastewater treatment system with which Stroh hoped to achieve compliance with its permit and with the categorical standards which the permit implemented. Stroh stated:

> We realize that we are behind schedule again. The problems that we encountered after our May 4th meeting were unforeseeable and directly responsible for delaying start-up until May 30th, the date by which we were supposed to be in compliance. Once start-up occurs though we anticipate no further problems and hope to be in compliance within a week.

(AA-58-59).

Effective July 1, 1990, Stroh abandoned MMSD outfall 3 and discharged all its industrial process wastewater through what became defined in October 1990 as MMSD outfall 4, defined as the sampling station located downstream of its pretreatment system. (AA-65-66). Stroh's August 28, 1990 baseline monitoring report regarding operation of the new pretreatment system stated that Stroh's die casting wastewater "is pumped through an Abcor ultrafiltration unit to remove oil and grease. The filtered effluent from the Abcor unit is then pumped to the new wastewater pretreatment system to remove the zinc and phenols." (AA-82). The Baseline Monitoring Report included a facility diagram confirming that the Abcor Unit discharge was now rerouted to outfall 4, where Stroh repiped its process wastewater to a single outfall. (AA-94). After reporting that all three samples taken of the new system's discharges during July 1990 were in violation of one or more effluent limitations (zinc, lead and phenols), Stroh's President and its consulting engineer certified:

> The data submitted in this report shows that the process wastewater generated at Stroh Die Casting is not consistently in compliance with applicable discharge standards. This information is, to the best of my knowledge and belief, true, accurate, and complete.

(AA-89, 91-92).

Stroh's discharges from its new pretreatment system, at newly defined outfall 4, continued to intermittently violate its permit limitations, and MMSD issued a notice of noncompliance to Stroh on March 27, 1991, relating to discharges in October 1990, November 1990 and January 1991. A subsequent notice of noncompliance was issued on June 24, 1991, relating to a discharge on May 13, 1991, in excess of the zinc limitation. (AA-95-98; AA-101-102). Stroh did not dispute that it was in noncompliance, and wrote MMSD on July 9, 1991, describing its efforts "to alleviate" the cause of the May 13, 1991 exceedance of its permit limits. The letter stated that the equipment which Stroh planned to use to deal with the problem was scheduled to be installed by July 31, 1991. (AA-99-100; AA-103-104).

As a result of Stroh's noncompliance, MMSD published a notice in the *Milwaukee Journal* on March 29, 1992, which lists Stroh as one of 15 industrial users which were in significant noncompliance during 1991, pursuant to the criteria of applicable regulations. (AA-110).

Meanwhile, Stroh continued to discharge *nonprocess* water to the storm sewer pursuant to its DNR permit. In its Discharge Monitoring Report (DMR) received by the DNR on April 16, 1992, Stroh reported discharging 11 milligrams per liter of oil and grease at DNR storm sewer outfall 003 on February 6, 1992,

compared to the 10 milligrams per liter daily maximum limit of its permit. Stroh alleged that the sample result was in error, and the DMR contained the following notation: "Note: Attached lab report shows lab process error." (AA-107). However, no such report was found in the DNR file. (Rec. 26, p. 8). To support its assertion that the lab report was in error, Stroh submitted a letter from the lab *dated May 13, 1992*. The letter stated in relevant part:

> As part of the method, an oil standard of known concentration is analyzed along with the samples to determine the accuracy of the analyses. The standard that was run on February 27 had a recovery of 50%. This is below our acceptance level. This could indicate that there was a problem with the O&G analyses that day, meaning that the results for your two samples tested that day may not be accurate.

(AA-108). On March 22, 1996, District Judge Rudolph T. Randa granted Stroh's motion and denied Atlantic's motion. The district court ignored Stroh's continued discharges at MMSD outfall 3 for more than six weeks after the amended complaint was filed, during a period when Stroh had admitted its inability to comply with the categorical standards, and ruled that Stroh's discharges at MMSD outfall 4 were beyond the scope of Atlantic's notice and therefore not part of the action. For those reasons, the district court held that Stroh was not an ongoing violator with respect to discharges to MMSD. With respect to Stroh's discharges to the Bluemound Tributary regulated by the DNR, the district court held that a "faulty" lab test could not be the basis for a violation, ignoring that the lab's letter indicated that the sample report probably *understated* the actual concentration of oil and grease in the sample. Judgment of dismissal was entered the same date.

On appeal, the Seventh Circuit found that Atlantic's pre-suit notice fully complied with the requirements of the Act and regulations. It further found that the notice was sufficient to encompass Stroh's post-complaint discharges of die casting wastewater at newly numbered outfall 4, and that "the violation had certainly not ceased by the time the amended complaint was filed." (B-12). With respect to the discharges at DNR outfall 3, the Seventh Circuit found the district court to have erred in granting summary judgment to Stroh on disputed facts. (B-14). Accordingly, the Seventh Circuit reversed the decision of the district court and remanded the case.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT'S READING OF THE CLEAN WATER ACT NOTICE REQUIREMENT IS NOT IN CONFLICT WITH *HALLSTROM v. TILLAMOOK COUNTY* OR WITH THE DECISIONS OF OTHER CIRCUITS.

The petition asserts that the Seventh Circuit's decision conflicts with the court's interpretation of the notice requirement in *Hallstrom v. Tillamook County*, 493 U.S. 20, 26, 110 S. Ct. 304, 308-09, 107 L. Ed. 2d 237 (1989), *reh'g denied*, 493 U.S. 1037, 110 S. Ct. 761 (1990), and with the decisions of other circuits. In fact, as the Seventh Circuit correctly noted, *Hallstrom* "said nothing about the content of the notice." (B-9). There is no contention here that Atlantic failed to send its notice to any of the parties entitled to receive it, or failed to wait the required 60 days before filing suit, and there is no conflict with *Hallstrom*.

Nor does this case raise any conflict between the circuits. In *Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351 (9th

Cir. 1995), the Ninth Circuit affirmed dismissal because the pre-suit notice failed to adequately identify the organizations which brought the suit as plaintiffs, as required by 40 C.F.R. § 135.3(a). There is no contention here that Atlantic failed to meet these requirements, and no conflict with *Washington Trout*.

Petitioner argues that this case conflicts with *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1249 (3rd Cir. 1995), which held that both pre-suit and post-complaint violations of the same type (same parameter, same outfall) as a violation included in the plaintiff's notice letter may be included in the citizen suit. The Third Circuit reasoned that such violations were related to or represented a continuation of violations identified in the notice, and that their inclusion in a citizen suit was required by the concept of "complete compliance" underlying *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987). In short, the Third Circuit recognized that " 'complete compliance' should incorporate the correction of all such interconnected violations." *Hercules*, *supra* at 1252.

Petitioner complains that the Seventh Circuit has gone beyond or abandoned the Third Circuit's "outfall-by-outfall" approach. In *Hercules*, one of defendant's outfalls discharged to the Delaware River, the other to Clonmell Creek. 50 F.3d at 1242. Achieving complete compliance at an outfall would therefore have required the defendant to bring all of its discharges into a particular waterway into compliance. Here, more than six weeks after the complaint was filed, Stroh diverted its contaminated wastewater from one outfall to another, without bringing its discharges to the sanitary sewer system into compliance. While the outfall or sampling point changed, Stroh's contaminated wastewater continued to be discharged into the same sanitary sewer system both before and after the diversion.

Under these circumstances, the Seventh Circuit appropriately treated Stroh's post-complaint discharges at outfall 4 as related to or interconnected with the pre-complaint discharges identified in Atlantic's notice:

> We do not read the Third Circuit as establishing an inflexible rule that would require outfall-by-outfall notice in all cases. It was not faced with a case where the alleged polluter, upon receiving a notice about one offending outfall, simply redirected the stream of contaminated water to another outfall. The key to notice is to give the accused company the opportunity to correct the problem. Here, there is no question that Atlantic's April 1989 notice sufficiently informed Stroh about Atlantic's claim that its handling of the die casting wastewater did not comply with the statute. Stroh promptly secured a permit that covered exactly these discharges, under the outfall numbered 3 in the first MMSD permit. It began construction of a treatment facility, which it completed in June of 1990 (at least a month *after* the amended complaint was filed.). It then re-routed the very same die casting wastewater to its newly numbered outfall 4. Moreover, it admitted in its May 29, 1990 letter to the MMSD that it was not in compliance and attempted to explain why it missed its deadline for its wastewater treatment system. These are not the actions of a company that has not received enough information for purposes of the statutory notice provisions of the Act.

(B-10).

Petitioner further asserts that this case conflicts with *Atlantic States Legal Foundation v. United Musical Instruments*, 61 F.3d 473 (6th Cir. 1995), which applied the notice requirements of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"). The Sixth Circuit held that EPCRA did not allow a citizen suit for past failures to file toxic release reporting forms that had been cured by filing of the forms before commencement of the action.[2] The Sixth Circuit further decided that the plaintiff's pre-suit notice referring to defendant's violation of reporting duties for calendar years 1987-1990 did not provide jurisdiction for plaintiff to sue for violation of the defendant's *independent* reporting duty for calendar year 1991.

Whether the Sixth Circuit was correct in finding that a defendant's duty to file a report *under EPCRA* in a subsequent year needed to be separately noticed is not at issue in this *Clean Water Act* case. Regardless of whether the Sixth Circuit decision under EPCRA is correct, there is no conflict between it and the Clean Water Act cases decided by the Third and Seventh Circuits.

Unlike the independent pre-suit 1991 reporting violation found to be outside the scope of the EPCRA notice in *United Musical Instruments*, Stroh's post-complaint discharges at MMSD outfall 4 were related to and interconnected with the pre-complaint discharges identified in Atlantic's Clean Water Act notice. The post-complaint discharges represented nothing less than the continuation of Stroh's discharge of die casting process wastewater to MMSD in violation of Clean Water Act categorical standards — simply at a newly-defined sampling location, retroactively defined in October 1990 as "outfall 4".

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2. Interpretation of EPCRA's citizen suit provision is before the Court in Docket 96-643, reviewing *Citizens for a Better Environment v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, __ U.S. __, 117 S. Ct. 1079, 137 L. Ed. 2d 214 (1997).

They represented Stroh's ongoing, continuing violation, which continued long after suit had been commenced.

The Court noted in *Gwaltney* that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." 484 U.S. at 60, 108 S. Ct. at 383. The defendant in *Gwaltney* was concerned that failure to require proof rather than allegations of ongoing violations would permit citizen-plaintiffs whose allegations of ongoing noncompliance become false at some point in the litigation, because the defendant begins to comply with the Act, to nevertheless press their suit to conclusion. The Court's response to this concern recognized that "complete compliance" is not achieved unless all violations connected to the noticed violations have been remedied:

> Longstanding principles of mootness, however, prevent the maintenance of suit when "there is no reasonable expectation that the wrong will be repeated." In seeking to have a case dismissed as moot, however, the defendant's burden "is a heavy one." The defendant must demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Air Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable "protestations of repentance and reform." (citations omitted)

Gwaltney, *supra*, 484 U.S. at 66, 108 S. Ct. at 386.

The concurring opinion of Justice Scalia, in which Justices Stevens and O'Connor joined, provides further insight into what it means for a defendant "to be in violation" of the Clean Water Act on the day suit was brought. That opinion provides further support for the Third and Seventh Circuit's inclusion within the scope of a citizen suit of violations which are related to or interconnected with the violations in the pre-suit notice. Justice Scalia wrote:

> In my view, therefore, the issue to be resolved by the Court of Appeals on remand of this suit is not whether the allegation of a continuing violation on the day suit was brought was made in good faith after reasonable inquiry, but whether the petitioner was in fact "in violation" on the date suit was brought. The phrase in Sec. 505(a), "to be in violation," unlike the phrase "to be violating" or "to have committed a violation," suggests a state rather than an act — the opposite of a state of compliance. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains, for purposes of Sec. 505(a), "in violation" of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation. It does not suffice to defeat subject matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed. Subject matter

> jurisdiction "depends on the state of things at the time of the action brought"; if it existed when the suit was brought, "subsequent events" cannot "oust[]" the court of jurisdiction.
>
> * * *
>
> Thus, I think the question on remand should be whether petitioner had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought.

Id., 484 U.S. at 69-70, 108 S. Ct. at 387-88.

Here, Stroh was not able to bring its die casting process wastewater discharges into compliance with categorical standards until more than a year after Atlantic's amended complaint was filed. Until then, while Stroh had obtained a permit, it had not achieved complete compliance for the violations in Atlantic's notice — it was still unable to meet the limitations established by the permit and by categorical standards. For more than six weeks after the complaint was filed, Stroh's die casting process discharges continued to go to the sanitary sewer system through outfall 3; thereafter they went to the sanitary sewer system through outfall 4, which wasn't even defined in Stroh's permit for several additional months. The Seventh Circuit's ruling that those discharges were within the scope of Atlantic's citizen suit correctly follows this Court's guidance in *Gwaltney* and does not conflict with *Hallstrom* or the decisions of other circuits.[3]

3. Review of the "jurisdictional" issue presented by Stroh relating to the scope of Atlantic's notice regarding discharges to MMSD would affect only the scope of this action, not the district court's jurisdiction (Cont'd)

II.

PETITIONER'S INTERPRETATION OF THE NOTICE REQUIREMENT WOULD HAVE BEEN IMPOSSIBLE FOR ATLANTIC TO HAVE COMPLIED WITH, AND WOULD ENABLE POLLUTERS TO INSULATE THEMSELVES FROM CITIZEN SUITS SIMPLY BY SHIFTING THEIR ILLEGAL POLLUTION TO A DIFFERENT OUTFALL OR SAMPLING LOCATION, WITHOUT CURING OR ERADICATING THE POLLUTION ITSELF.

Petitioner argues that Atlantic's notice was required to identify outfall 4 as the location of Stroh's post-complaint violations in order to include them in its citizen suit. The regulation in question, 40 C.F.R. § 135.3(a), actually only requires sufficient information to enable *the recipient* to identify the location, which the notice did provide. Moreover, Stroh's argument would lead to absurd results.

The petition asserts at page 15 that "before Atlantic States filed its amended complaint in May, 1990, it could have noticed the violations it now claims — and Stroh, the EPA, and the DNR

(Cont'd)

over the action. There is no dispute that Stroh's post-complaint discharges at outfall 3 are within the scope of Atlantic's notice. As the record indicates, Stroh was unable to bring its die casting wastewater discharges into complete compliance for more than a year after the amended complaint was filed. Clearly, based on Stroh's failure to remedy the cause of its unlawful discharges at outfall 3, Stroh was "in violation" at outfall 3 on the date the amended complaint was filed and for more than six weeks later. Thus, the district court has jurisdiction over this case, based on the outfall 3 discharges alone, regardless of whether the outfall 4 discharges are included. In addition, Atlantic's claims relating to Stroh's unlawful discharges to the Bluemound tributary of the Menomonee River, as regulated by its Wisconsin DNR permit, remain for adjudication.

could have addressed them before suit." In fact, any notice before July 1, 1990 alleging die casting wastewater discharge violations at "outfall 4" would have been in error, and any such notice before October 1990 would have required Atlantic to be clairvoyant. It wasn't until July 1, 1990 that Stroh abandoned outfall 3, rerouted its die casting wastewater through the newly-installed pretreatment system, and began to discharge die casting wastewater through "outfall 4." Stroh's permits from the sewerage district didn't even define the new outfall 4 until October 1990.[4] No enforcement action could have been taken by government agencies relating to die casting wastewater discharges at outfall 4 before the amended complaint was filed for precisely the same reason — there weren't any such discharges there until July 1, 1990.

No purpose is served by requiring Atlantic, or other citizen-plaintiffs, to correctly guess in advance either the locations to which polluters will decide to pipe their unlawful post-complaint discharges or the specific numbers which regulators may assign in the future to monitoring or sampling locations. Moreover, under Stroh's argument regarding notice, all any polluter need do to bar a citizen suit is to call a plumber and shift its illegal pollution to a different outfall — without curing or eradicating the pollution itself. With enough pipes and enough plumbers, any polluter could insulate itself from citizen enforcement forever. These results are contrary to the language of the Clean Water Act, to the requirements of the implementing regulation, and to the Court's guidance in *Gwaltney*. Nevertheless, those are the results of petitioner's arguments for review.

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4. Compare the 1989 definitions of outfalls 4.0, 4.1, and 4.2 with the October 1990 definition of outfall 4. (B-4 and B-5). The sewerage district could just as easily have decided in October 1990 to renumber the "surviving" Stroh outfall as 3 and the "abandoned" outfall as 4.

CONCLUSION

This case does not merit further review by this Court. For the reasons given above, Stroh's Petition should be denied.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

STROH DIE CASTING CO.,
Petitioner,

v.

ATLANTIC STATES LEGAL FOUNDATION, INC.,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

This case drones on with no possible purpose other than Atlantic States Legal Foundation's ("Atlantic States") attempt to garner attorney fees from Stroh Die Casting Co. ("Stroh") This case started in 1989 and has never had a hearing in the district court. It was dismissed twice by the district court -- in 1989 on the court's own motion and in 1996 on summary judgment.

Among other claims, Atlantic States bases jurisdiction on an alleged one milligram exceedence in 1992, supported only by a faulty laboratory test. It is physically impossible for Stroh to have been in violation at any of the noticed outfalls after 1990. It is also undisputed that Stroh has never been fined or sanctioned by any government agency for any violation of the Federal Water Pollution Control Act (Clean Water Act, 33 U.S.C. § 1251 et. seq.). Atlantic States' ability to keep this case on life support derives from the Seventh Circuit's mistaken and misguided decision to dilute the notice requirements of the Clean Water Act.

I. Atlantic States cannot reconcile the significant conflict between the Seventh Circuit's decision and Hallstrom.

In its Brief in Opposition, Atlantic States dons blinders and states that there is no conflict between the Seventh Circuit's interpretation of the notice requirement of the Clean Water Act and this Court's decision in Hallstrom v. Tillamook County, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d. 237 (1989), reh'g denied, 493

U.S. 1037, 100 S.Ct. 761 (1990). Hallstrom directs the lower courts to strictly construe notice provisions like the one in the Clean Water Act:

> [T]he Notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion.

Hallstrom, 493 U.S. at 31. As the various court of appeals decisions have held, these mandatory requirements are not limited to simply sending a vague notice to the requisite persons and government agencies and waiting 60 days. Rather, the notice must include meaningful information required by the statutes and regulations:

> The language of [40 C.F.R. § 135.3] does not suggest that the notice may be good enough if it generally orients the agency or violator as to the type of the violation. . . . [T]he recipient of the notice must understand from the notice what the citizen is alleging, not what the citizen could allege if the citizen knew more or cared about other possible transgressions.

California Sportfishing Protection Alliance v. City of West Sacramento, 905 F.Supp. 792, 799 (E.D.Ca. 1995).

The Seventh Circuit would allow Atlantic States to proceed with claims related to MMSD outfall 4 -- an outfall which was never included in a 60-day notice of intent to sue. As Judge Manion recognized in his dissent, the Seventh Circuit's "expansive reading" of the notice requirement runs afoul of Hallstrom's

mandate to strictly construe the notice requirement. (Appendix B, B-20)

Atlantic States stretches logic even farther in its claim that the Seventh Circuit's decision does not conflict with Atlantic States Legal Foundation v. United Musical Instruments, 61 F.3d. 473 (6th Cir. 1995) and Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 50 F.3d 1239 (3d. Cir. 1995).

In United Musical Instruments, the Sixth Circuit followed Hallstrom and rejected arguments -- synonymous with Atlantic States' arguments here -- for a vague, "catch-all" notice. In United Musical Instruments, Atlantic States (the citizen-plaintiff in that case as well) sued for a 1991 violation of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA", 42 U.S.C. §11001 et. seq.) although the violation was not included in its 60-day notice. The Sixth Circuit found that the district court lacked jurisdiction to hear this claim because Atlantic States' "catch-all" notice, which provided that a future suit would include "violations not yet known to ASLF of other EPCRA reporting requirements", was insufficient. United Musical Instruments, 61 F.3d at 478.

Atlantic States attempts to distinguish United Musical Instruments as a case arising under EPCRA, rather than the Clean Water Act. (Respondent's Brief in Opposition, 10) In presenting this "distinction", Atlantic States ignores the fact that the 60-day notice provision of EPCRA, 42 U.S.C. § 11046(d), is

substantively identical to the notice provisions in both the Clean Water Act and the Resource Conservation and Recovery Act of 1976 ("RCRA", 42 U.S.C. § 6972). See United Musical Instruments, 61 F.3d at 478; Hercules, 50 F.3d at 1246; Washington Trout v. McCain Foods, Inc., 45 F.3d. 1351, 1353 n. 3, (9th Cir. 1995). In fact, as the Court noted in Hallstrom, the notice provisions in each of these environmental laws were based upon the 60-day notice provision of the Clean Air Amendments of 1970, 42 U.S.C. §7604. Hallstrom, 493 U.S. at 23. Atlantic States' attempt to distinguish United Musical Instruments fails.

Clearly Hercules also conflicts with the Seventh Circuit's decision. In Hercules, the Third Circuit extended jurisdiction over Clean Water Act violations which the citizen-plaintiff did not specifically notice only when they are "interconnected" with violations that were noticed. Contrary to Atlantic States' claim at pages 8-9 of its Brief, the Third Circuit clearly limited "interconnected" violations to "violations of the same type (same parameter, same outfall) occurring during and after the period covered by the notice letter." Hercules, 50 F.3d at 1250. In the present case, the Seventh Circuit has moved far beyond the Third Circuit's already-relaxed reading of the notice requirement.

The Seventh Circuit's decision conflicts with the policy of strict construction set forth in Hallstrom and applied in United Musical Instruments and Hercules. The Seventh Circuit's new, flexible interpretation of the notice requirement will no doubt

invite even more citizen suits and will further burden the federal courts.

II. Government agencies, rather than private plaintiffs, are the primary enforcers of the Clean Water Act.

The installation of the new treatment system was not a scheme by Stroh to avoid detection by Atlantic States. Rather, this project, closely monitored by the permitting agency, was part of Stroh's effort to effectively treat all process wastewater. As Judge Manion stated in his dissent, the record properly supports the "conclusion that Stroh methodically and effectively addressed the problem," and did not "play[] a shell game with the regulatory authorities (and Atlantic) by constructing the new wastewater treatment [system]." (Appendix B, B-19-20)

Atlantic States' Brief in Opposition misstates the facts regarding MMSD outfall 4. Since Stroh's first permit, in July, 1989, MMSD outfall 4 was a separate monitoring and reporting station, just like MMSD outfall 3. MMSD outfall 4 is where wastewater from Stroh's parts washer and deburring were discharged. Such wastewater was still discharged there after the new treatment system was hooked up in 1990. MMSD outfall 4, as a monitoring station, was not moved or renumbered. (Appendix B, B-20)

Stroh did not repipe or install treatment equipment in response to Atlantic States' lawsuit. The lawsuit was irrelevant to what Stroh was already doing to address wastewater issues.

(Appendix B, B-16, 20) The DNR approved Stroh's plans for the new treatment system in March, 1990, weeks before Atlantic States filed its amended complaint. In fact, Atlantic States' first complaint was dismissed during the time Stroh was planning the new system and ordering equipment for it.

Atlantic States' assertion that it would require "clairvoyance" to provide a 60-day notice of intent to sue for the alleged violations at MMSD outfall 4 is pure fiction. (Atlantic States' Brief in Opposition, 15) As the district court recognized, Atlantic States most certainly could have provided Stroh, the U.S. Environmental Protection Agency, and the Wisconsin Department of Natural Resources ("WDNR"), with a notice of intent to sue for violations at MMSD outfall 4. (Appendix A, A-13-14) Stroh's first permit, in July, 1989, identified MMSD outfall 4 as a process wastewater discharge point. (Appendix B, B-20) Monitoring reports for MMSD outfall 4 were available to Atlantic States starting in 1989 -- and continued to be available after the treatment system became operational in June, 1990. (Appendix B, B-20) It would have been a "minimal imposition" on Atlantic States to provide the appropriate notice for MMSD outfall 4 and later amend its complaint.[1]

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[1] This was precisely the position taken by the United States in its amicus brief in Hercules: "As the United States discusses, if the citizen plaintiff develops reporting violations in the course of discovery there is no reason why the plaintiff cannot give the sixty day notice and then seek to amend the complaint to add the new allegations." California

Atlantic States' concerns that companies like Stroh will hire armies of plumbers to constantly shift wastewater discharges to different outfalls in order to avoid citizen suits is misplaced and silly. (Brief in Opposition, p.15) For one thing, each outfall, by its permit definition, is subject to specific effluent discharge limitations. Obviously, the permit-issuing authority cannot allow a company to maintain "spare" outfalls or to constantly shift and redefine outfall locations.[2]

Atlantic States has ignored the significant concern raised by Stroh in its Petition that allowing Atlantic States to pursue claims at an outfall which was never noticed frustrates the second purpose of notice under the Clean Water Act. That purpose -- allowing government entities to enforce the Clean Water Act and thereby avoid a citizen suit -- is particularly significant in this case. At the time Atlantic States filed its Amended Complaint, Stroh was working closely with government enforcement agencies to eliminate potential problems through the permitting process. (Appendix B, B-19-20) The District Court properly recognized

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Sportfishing Alliance v. City of West Sacramento, 904 F.Supp. 792, 799 n. 7, (E.D.Ca. 1995).

[2] It is impossible to play a regulatory "shell game" as suggested by Atlantic States. The WDNR must examine plans and approve "any modification or alteration of an existing industrial pretreatment facility which may affect the quality or quantity of the discharge to a sewerage system." Wisconsin Administrative Code, Chapter NR 108.02(13)(f); NR 108.03.

that Atlantic States' notice never gave the government entities an opportunity to act:

> What is not known is whether Stroh and the MMSD would have taken additional, different, and/or quicker steps to resolve these problems at point source No. 4 had point source No. 4 been specifically mentioned in Atlantic's earlier notice. . . or in a subsequent notice. Stroh and the MMSD should have been given that chance. Atlantic had easy access to all the records of Stroh's violations. The imposition on Atlantic to give specific notice as to violations at another point source and file an amended complaint was minimal in light of the important goals that may have been achieved by that notice (i.e., remedy of the violations and avoidance of a lawsuit.)

(Appendix A, A-13-14)

Thus, the Seventh Circuit has ignored one of the two purposes of notice by finding that the "key to notice is to give the accused company the opportunity to correct the problem". (Petition, 13-15; Appendix B, B-10) As this Court recognized in Hallstrom, the 60 day notice serves two important purposes. The notice not only gives the alleged violator "an opportunity to bring itself into compliance with the act" but also "allows government agencies to take responsibility for enforcing environmental regulations." Hallstrom, 493 U.S. at 29, citing Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60, 108 S.Ct. 376, 383, 98 L.Ed.2d 306 (1987).

Government agencies cannot properly assume this responsibility when the citizen-plaintiff provides a vague notice:

> When the notice is precise, sixty days is none too much time for an agency to resolve on a course of action and take necessary steps whether to settle the matter or bring an enforcement action. But if the notice is imprecise, and requires the agency to develop on its own what the scope of the alleged violations are, then it becomes entirely impractical for the notice provision to fulfill its purpose in such a short time period.

California Sportfishing, 905 F.Supp. at 799.

III. A single exceedence of one milligram based upon a faulty laboratory test does not make a "continuing violator".

In addition to making claims related to MMSD outfalls 3 and 4, Atlantic States asserts in its Brief in Opposition that Stroh is a "continuing violator" at WDNR outfall 003. (Brief in Opposition, p. 13-14, n. 3) On November 8, 1988, Atlantic States sent a 60-day notice of intent to sue to Stroh identifying alleged exceedences at WDNR outfall 003. DNR outfall 003 is simply a storm water catch basin in the Stroh parking lot. No process wastewater is discharged through DNR outfall 003.

In February, 1992, Stroh reported a one milligram per liter exceedence of its permit limitation for oil and grease at DNR outfall 003. The laboratory reporting this one milligram exceedence later admitted a process error in the testing for that day. The Seventh Circuit would nevertheless allow Atlantic States

to pursue this claim, despite the fact that the only post-complaint exceedence that has ever been alleged occurred over three years after the 60-day notice. To reach this result, the Seventh Circuit has stretched the meaning of "ongoing or intermittent" to an unreasonable extreme.

The practical impact of the Seventh Circuit's decision reaches far beyond this case. Under the Seventh Circuit's rule, a company may be labeled as an "ongoing or intermittent" violator, even if the citizen-plaintiff can show only one post-complaint exceedence which is of minuscule proportions, which is based upon a faulty laboratory test on parking lot run-off, and which comes years after the original notice.

CONCLUSION

The petitioner, Stroh Die Casting Co., respectfully requests that the Court grant the petition for a writ of certiorari.

Dated at Milwaukee, Wisconsin this 7th day of November, 1997.

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